UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

TIME INC.

and	**Case Nos.**	**02–CA–134835**
		02–CA–139331
THE NEWSGUILD OF NEW YORK,		**02–CA–141216**
CWA, LOCAL 31003		**02–CA–142739**
		02–CA–152002

Miriah Berger Esq., for the
General Counsel.
Jonathan L. Sulds Esq. and
Justin F. Keith Esq., for the
Respondent.
Hanan B. Kolko Esq., for the
Charging Party.

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York on various dates in 2016. The charges and the amended charges were filed on August 15 and 27, October 22, November 19, December 12, 2014, and January 29, and May 1, 2015. The complaint was issued on August 31, 2015, and amended on October 15, 2015. In substance, the complaint, as amended, alleged as follows.

1. That the Respondent for many years has recognized the Union as the collective-bargaining representative of certain of its employees.

2. That the Respondent bypassed the Union and dealt directly with employees by negotiating individual separation agreements with them. It is contended that agreements were made with the following employees on the following dates:

Allen Sloan	12/10/14
Rebecca Shore	1/26/15
George Dohrmann	1/26/15
Valerie Georgoulakos	3/31/15
Jennifer Broughel	3/31/15 and 4/9/15

3. That since on or about August 8, 2014, the Respondent refused to furnish to the Union the following information that had previously been requested.

(a) A list of all individuals performing work for Time Inc. under the YOH contract, including names of individuals, salaries, number of hours worked, work assignments, and names of the manager assigning work to each individual covered under YOH contract.

(b) Payroll and other documents reflecting salaries and/or wages paid to all non-bargaining unit employees, [performing same or similar work to the employees in the bargaining unit described above] as of December 31, 2011 to the present (including salaries and/or wages paid to all non-bargaining unit employees for the years 2012, 2013 and 2014), including increases and the dates any increase was effective during those years, up to and including the present date.

4. That by memoranda dated April 11, May 16, June 25, and August 22, 2014, the Respondent announced unilateral changes to the 401(k) investment options and fees without following the notification and discussion requirements contained at article XIV, section 2 and article XV, section 11 of the collective-bargaining agreement. (The agreement expired on August 27, 2014.)

5. That the aforesaid changes were made unilaterally by the Respondent without the Union's consent and in the absence of an overall impasse in bargaining.

6. That on November 20, 2014, the Respondent implemented the terms and condition of its "last, best and final offer." The complaint alleges that these changes were made in the absence of an overall good-faith bargaining impasse and modified the terms and conditions of the expired contract as to the following items:

Tentative agreements
Subcontracting
Temporary employees
Early retiree medical benefits
Elimination of the volunteer layoff provision
Elimination of rehire provision
Severance Pay
Minimum vacation schedule
Multiple classification pay
Inclusion of hourly rates in the collective bargaining agreement
Part-time employee eligibility
Certain project employees.

7. That on November 17, 2014 (after the contract had expired), the Respondent, unilaterally and without bargaining to impasse and without the Union's consent, implemented its subcontracting proposal which among other things, reserved to the Respondent the sole discretion to subcontract.

8. That as a consequence of its unilateral change of the subcontracting provision in the expired contact, the Respondent subcontracted certain work to an agency and without bargaining with the Union, laid off the following employees on the dates listed below.

Robert Beck	5/23/15
Simon Bruty	5/23/15
William Frakes	5/23/15

David Klutho	5/23/15
John McDonough	5/23/15
Albert Tielemans	5/23/15
Anna Druzcz	6/26/15
Neal Clayton	7/17/15
Charlotte Coco	7/17/15
Brian Luckey	7/17/15
Po Fung Ng	7/17/15
Barry Pribula	7/17/15
Peter Nora	10/16/15
Hai Tan	10/16/15
Vuane Trachtman	10/16/15

9. That on January 1, 2015, the Respondent, unilaterally and without bargaining to impasse, implemented a new health insurance plan for bargaining unit employees.

10. That on November 20, 2014, the Respondent, in the absence of an impasse and without the consent of the Union, implemented its temporary employee proposal and thereby altered the bargaining unit by eliminating a job classification.

11. Alternatively, by insisting to impasse on eliminating the temporary employee classification in the unit description, the Respondent insisted as a condition of reaching an agreement, on a "permissive subject of bargaining."

12. That on November 20, 2014, the Respondent unilaterally and in the absence of a lawful impasse and consent of the Union, eliminated the volunteer layoff provision contained in article XXI, section 6(a) of the expired contract.

13. That as a consequence of the foregoing, the Respondent laid off the employees listed below without adhering to the layoff provisions of the expired contract.

Patrick Yang	12/5/14
Margery Frohlinger	12/5/14
Erica Fahr Campbell	2/13/15
Duane Pyous	4/3/15

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

1. History

The facts in this case are essentially undisputed. Both sides took copious notes of the bargaining sessions and these were received into evidenced by stipulation. To the extent that witnesses testified about the bargaining or other facets of the case, this was mainly to explain in more detail some of the respective positions that were taken or how the respective positions affected unit employees or past history.

As a result of a corporate merger, Time Inc. became part of Time-Warner until 2014. On June 6, 2014, the enterprise was split into two parts, with Time Inc., becoming a separate corporate entity with separate management. Time Inc., after the split, essentially operated as a publisher of magazines either in print or in on-line formats.

The Guild was originally certified by the Board in separate magazine wide bargaining units back in the 1940s. The magazines where bargaining occurred were Time, Life, Fortune, Sports Illustrated, Money, People, and Fortune Small Business. The certifications in 02–RC–015662, 02–RC–15808, 02–RC–16968, and 02–RC–16825 are no longer available.

Subsequent to the original certifications, the publisher produced other magazines, each with their own staffs and which were nonunion. One example is Real Simple. In this regard, the staffs of the magazines covered by the collective-bargaining agreement and those not covered by the contract worked in the same building and did essentially the same or at least substantially overlapping work. Writers write, copy editors edit, photographers take pictures and photo editors edit photographs. Thus, at the primary work location, there were two groups of employees doing essentially the same type of work; one set that worked for magazines covered by a bargaining agreement and the other set doing work for magazines that had no contract with the Union.

At the time of the events described, the Guild represented between 280 to 300 employees. Of this number, there were about 180 full-time employees, about 15 to 20 regular part-time employees plus about 100 temporary employees.[1] In this regard, temporary employees were utilized when needed and although covered by the collective-bargaining agreement, they were not entitled to the full panalopy of benefits available to other unit employees. The group represented by the Guild was a small part of the employer's entire work force which consisted of over 5000 employees.

In more recent times, and with the advent of the Internet, the company has established and set up magazine web sites that have their own staffs. For example there is Time Magazine where the staff is unionized and then there is Time.com where the staff is nonunion. The employees of Time.com did basically the same work, out of the same offices, as the unionized workers at Time magazine. Because of this overlap of employee functions, the Union has, at various times, proposed that the workers employed at the website magazines be accreted to the existing bargaining unit. The employer has rejected those demands, citing Section 7 of the Act. In any event, the General Counsel is not alleging that any of these uncovered workers are accretions to the existing unit.

[1] There also was a small number of people who were called project employees. As the name implies, these were individuals assigned to projects of varying duration. During negotiations the employer and the Union agreed that 4 persons in this category should be reclassified as regular employees.

The most recent contract was set to expire on February 1, 2013. During the time that this contract was in effect, the parties to the contract were the Union and Time Inc. as a division of Time Warner. It should be noted that toward the end of the contract term, Time Warner's management was contemplating either selling the publications of Time Inc. or severing that enterprise from the corporate home. It is also noteworthy that the collective-bargaining agreement provided the unit employees of Time Inc. with the same coverage as all other Time Warner employees. Looking forward for the moment, this meant that when Time Inc., was actually severed from Time Warner, the new company no longer was a party to the preexisting health care or 401k programs and had to negotiate with outside vendors for new plans.

The first bargaining session took place on January 23, 2013. Thereafter, the parties had 30 bargaining sessions over a period of 22 months. On November 20, 2014, the Respondent announced that it was putting into effect its last offer. It should be noted that although the contract had expired on February 1, 2013, the company agreed to numerous union requests to extend its terms. After many extensions, the company finally refused to extend it any further and the contract expired on August 27, 2014.

The principle negotiator for the company was attorney, Jonathan Sulds. Other members of the employer's bargaining team were Joanna Helferich, Michelle Goldstein, and Roxanne Flores.

Anthony Napoli was the chief negotiator for the Union. Also on that side of the table were attorney Richard Corenthal, Dan Neuburger and employees Jill Jaroff, John Shostrum, Judith Fedbel Watson. Also assisting were retirees, Edith Fried and Alan Levine.

In June 2014, after negotiations had already commenced, Time Inc. was spun off from Time-Warner and became a separate entity. I assume that the company's negotiators were aware of this possibility when negotiations commenced on January 23, 2013, and I am certain that this change in the enterprise's structure had a significant impact on the company's negotiating strategy. As will become evident as we discuss the progress of the negotiations, the new company was seeking to obtain substantial concessions from the Union in terms of both economic and contractual language provisions. Also, as noted above, when Time Inc. was spun off from Time-Warner, it no longer was a party to the preexisting health insurance plan and it needed to create its own plan for its employees. The same was true for the 401(k) plan.

For its part, the evidence shows that the Union essentially had a defensive strategy; seeking to prevent substantial detrimental changes to the terms of the expired contract. And in my opinion, its strategy was to stretch out the negotiations for as long as possible in order to preclude the company from effectuating any changes in the terms and conditions of employment for the unit employees.[2]

In this regard, I have no qualms with such a strategy, although I must say that I don't think the law would allow it to be carried out to its logical conclusion. That is, as a practical application of one of Zeno's paradoxes, it would theoretically be possible for a union, seeking to

[2] A part of the reason for this strategy may have been that at one bargaining session, the Union's representative conceded that only about 30 percent of the bargaining unit employees were union members. In any event, it seems to me that the Union was not interested in pressing its demands via any kind of strike action. And by the same token, it seems to me that the company was not willing to engage in a lockout to press its demands.

avoid an impasse over an employer's demands for concessions, to postpone it in perpetuity, simply by making tiny concessions every time an impasse approached. [3]

In order to make sense of the negotiations, we need to look at some of the terms of the expired collective-bargaining agreement. Some of the relevant provisions were as follows:

Article III definitions.

Covered employees are "employees" who work for the specific magazines covered who are in the editorial department. Also covered are part-time employees, meaning those who work each week less than the normal weekly hours. Finally, included are "Temporary employees" who perform temporary or seasonal work or who work as substitutes. Temporary employees can become a regular employee or a project employee if they work a specified number of hours in a given period of time. Project employees are also covered if they work for one of the covered magazines and these are defined as persons who are hired to work a specific project.

Article XIV Benefits

Section 2(a) If during the term of this Agreement, the publisher desires to amend or change present benefit plans or initiate new benefit plans, insofar as such plans apply to the employees… the publisher will give the Guild advance notice of at least 60 days before any open enrollment period for a benefit plan, where the result would be a decrease in a benefit plan and will discuss with the Guild the reasons for such changes or amendment before making such amendments or changes…

Section 2(b) If during the term of this Agreement, the publisher desires to amend or change present benefit plans in a manner which does not decrease benefits, the publisher shall give at least 20 days' notice to the Guild before any open enrollment period … and will, if requested discuss with the Guild the reasons for such changes or amendments before any open enrollment period…

Section 6(a) Part time employees hired on or after October 1, 2007 whose guaranteed schedule of work is less than 17½ hours a week shall not be eligible for hospital-medical benefits…

Article XXI Job security; Reduction in force.

Section 6(a). When a function within a geographic location, department and division shall be reduced for any reason, (including automation and/or economic), the publisher shall offer to employees performing such function the opportunity to resign and shall make every reasonable effort to accept as many volunteers as possible. The Publisher shall, however, accept resignations of 90% of the eligible volunteers or 90% of the jobs to be eliminated whichever is smaller.

[3] The dichotomy paradox is as follows: Suppose one wants to walk to the end of a path. Before he can get there, he must get halfway there. Before he can get halfway there, he must get a quarter of the way there. Before traveling a quarter, he must travel one-eighth; before an eighth, one-sixteenth; and so on. This description requires one to complete an infinite number of tasks, which Zeno maintains is impossible. See Wikipedia entry on Zeno's paradoxes.

Article XXII. This is a standard type of grievance/arbitration procedure.

Side letter 5.

No Guild covered employee shall be required to write for or perform work of any kind for operations of the publisher that the publisher does not recognize as covered by Guild jurisdiction.

Services for the publisher's additional operations may be voluntarily provided by Guild covered employees provided that when doing so, the employees shall continue to be covered by and subject to all of the terms and conditions of the collective bargaining agreement in effect between the guild and the publisher.

When providing services for additional operations, a Guild covered employee's workload shall be adjusted to permit such additional service with the employee's existing work time.

No employee will be negatively impacted with respect to their job evaluation in any way for failing or refusing to work for additional operations.

Any employee hired or employed by additional operations of the publisher routinely or regularly performing any work or services for any entity covered by the collective bargaining agreement… shall be considered a guild covered employee and shall be subject to all of the terms and conditions of said agreement.

The parties … agree that when guild covered employees perform non-bargaining unit work … the terms and conditions of their employment shall be governed by the CBA. Neither the performance of such non-bargaining unit work by guild covered employees nor anything else … shall change, vary or modify the work jurisdiction of the Guild as set for in the CBA.

It should also be noted that the expired collective-bargaining agreement contained no provisions about subcontracting.

Insofar as wages, the collective-bargaining agreement sets forth minimum rates for each of a dozen job classifications. Under the terms of the contract, employees were free to negotiate for more money directly with the company on their own behalf. Thus, there were writers, editors, photographers and other employees who earned a good deal more than the contract minimums.

2. The Negotiations

As noted above, the first bargaining session took place on January 23, 2013. At this time the Union was not notified that there was a possibility that Time Inc. might be split off from Time-Warner.

At this meeting, the company made a set of proposals; the major ones relating to a flexibility/multiplatform; subcontracting; and the elimination of the provision requiring volunteers when layoffs were necessary.

As to the flexibility/multiplatform proposal, the company was asking for contractual language whereby it would be free to assign bargaining unit members who worked on magazines within the Guild's jurisdiction to either the online versions of those magazines or to other magazines; none of which were covered by the collective-bargaining agreement.

With respect to subcontracting, the company proposed a provision that would allow it to subcontract out the work done by temporary employees. In this regard, temporary employees, under the terms of the existing contract, were covered by the agreement provided that they worked for one of the magazines encompassed by the labor agreement. At this time, the company utilized a substantial number of temporary employees and this class of employees comprised a significant, albeit less than half of the unit.

The issue relating to volunteers was that under the existing agreement, if layoffs were deemed necessary, the employer was required to ask for volunteers to be laid off and to accept 90% of the volunteers. As to this issue, the company expressed its desire to change this situation because it meant that the company would have less control over which employees it wished to retain if and when layoffs occurred.

On January 25, 2013, the company sent the Union a written set of proposals relating to these and other issues. In pertinent part these were:

1. **Multi-platform Personnel Assignment and Utilization**

At the publisher's discretion, employees may be assigned either temporarily or permanently to any job in any of the publisher's operations for which an employee is determined by the publisher to be qualified, regardless whether such operation … is within Guild jurisdiction….

No assignment of an employee to an operation… which is not within the jurisdiction of the Guild, shall expand, alter, modify or change the jurisdiction of the Guild, which shall continue as before as set forth in Article III, Section 1.

In the event the publisher shall assign an employee to a job in an operation which is not within the jurisdiction of the Guild, the terms and conditions of such employee's employment shall be governed by the collective bargaining agreement. No employee shall suffer a reduction in pay or benefits as result of an assignment to a job not within the jurisdiction of the Guild.

Only those individuals initially hired into jobs within the jurisdiction of the Guild, and those individuals who routinely and regularly perform work within the editorial departments specified in Article III, Section 1, regardless of the job for which hired, are employees within the meaning of the collective bargaining agreement. Individuals who are not initially hired into jobs within the jurisdiction of the Guild or who do not routinely and regularly perform work within the editorial departments specified in Article III, Section 1 are not within the jurisdiction of the Guild and the terms and conditions of such individual's employment are not… governed by the collective bargaining agreement.

2. **Job Eliminations**

Eliminate current volunteer process. Eliminate rehire rights, seniority to be factor only by comparison between bands of experience (e.g. 0-3 years; 3-10 years; 10 + years).

In the event of a layoff, in order to preserve benefit entitlements and work opportunities for employees, the publisher may reduce hours of work for employees in lieu of fully eliminating a position or positions.

3. **Subcontracting**.

Upon 30 days' notice to the Guild, the publisher may subcontract a job, jobs or a part or parts of its operations. Such notice shall set forth the publisher's plan for subcontracting including what job or jobs, operation or operations is or are to be subcontracted, the identity of the subcontractors, and the publisher's reasons for such subcontracting. The publisher shall confer with the Guild, following such notice with respect to the decision to subcontract and the effects of such subcontracting and shall supply such information concerning such subcontracting as the Guild may reasonably request.

Without limiting the foregoing… the publisher shall have the right to subcontract any current temporary position. Confirming present practices, the publisher may engage freelancers to fill temporary personnel need.[4]

A second meeting was held on February 20, 2013. The Guild asked if the rumors of a sale were true and stated that they could not make counter proposals until they knew what was going on. Sulds stated that the press reports about a sale were rumors and he couldn't comment on them. The Union requested information about any proposed sale and the parties disagreed as to whether the company had an obligation to provide such information. [5]

A meeting scheduled for February 21 was cancelled.

On March 11, 2013, the company forwarded to the Union a comprehensive collective-bargaining agreement that was drafted so as to retain those provisions of the expiring contract that it was willing to retain, plus elimination of those provisions that the company was proposing to eliminate, plus additional language representing new proposals that the company wished to incorporate into a new contract.

Among the proposals were the following:

1. That the minimum wage rates remain the same.

2. Regarding benefits, the company proposed to delete language stating that it shall continue in effect, during the term of the agreement, the various benefit plans such as health insurance, life insurance, long term disability, early retirement, pension, savings plan, dental benefits etc . . . . The proposal adds a provision to allow the employer, in its sole discretion and without any obligation to bargain, upon reasonable notice, to implement any change,

[4] As we go through the course of the negotiations, it should be kept in mind that the company had two separate proposals relating to subcontracting. One related to the subcontracting of work done by full-time or regular part-time bargaining unit employees. The second related to the subcontracting of work done by employees who were hired on a temporary basis at magazines covered by the collective-bargaining agreement.

[5] Subsequent to this meeting, there was an exchange of correspondence regarding information about a prospective sale. The company refused to provide such information and no charge was ever filed on this issue.

amendment, elimination, or modification to any benefit plan, provided the change applies to all eligible employees of the publisher. It provides for 30 days of notice unless not feasible.

3. The company's proposal included the proposals set forth on January 25 regarding the multiplatform/flexibility issue; the subcontracting issue vis a vis temporary workers; and the volunteer issue.

4. Additionally, the company proposed to eliminate side letter No. 5 so as to permit the employer to assign a bargaining unit employee to a different job outside the Guild's jurisdiction.

On April 18, 2013, the company notified the Guild that it willing to extend the contract to May 31, 2013. It also notified the Union that Time Warner intended to spin off Time Inc. as a separate corporation.

After a hiatus of about 4 months, the third meeting was held on June 6, 2013. At this meeting, the parties discussed the company's proposed contract in detail. The Union made no counter proposals but asked the company to recognize it as the representative of the employees who worked at the internet versions of the various magazines covered by the agreement. For example, as the Guild represented the employees of Fortune magazine, it wanted to have its contract extended to the employees of Fortune.com. The employer refused and the Union suggested that the existing contract be extended for 12 to 18 months.

The Union made its initial contract proposals at the 4th meeting held on June 27, 2013. This did not include any proposals on wages or minimum salaries. The company's representative said that they would like the Union to submit a comprehensive list of proposals so as to not elongate the process. There was a discussion of the employer's multiplatform/flexibility proposal and the Union indicated that it could agree to the employer having the right to assign unit employees within a brand. (i.e. employees working for Time magazine could be assigned to Time.com).

The 5th meeting was held on October 31, 2013. The company agreed to extend the contract to December 31, 2013, but stated that it wanted to set up a series of dates and that it was "time to put our shoulders to the wheel to reach a collective-bargaining agreement." The meeting substantially dealt with the employer's multiplatform proposal. The Union's representatives asked a lot of questions as to how the proposal would work in practice such as who would have the authority to assign employee. The Union's representatives stated that they were seeking to protect employees who might be affected by the company's proposal. Among the things suggested by the Union were ideas for training and for protections from adverse evaluations, layoffs, or discharges in the event that a unit employee was assigned to a dot.com entity and had difficulty adjusting. At this stage, the Union's representatives stated that they would prepare proposals.

For reasons that are not relevant, the parties could not meet again until March 4, 2014. In this interregnum, the company agreed to extend the contract until May 31, 2014.

The 6th meeting was held on March 4, 2014. At the outset of the meeting, the company asked for dates in March, April and May and stated that it viewed the May 31 expiration date as a "real" date by which time a contract needed to be reached. The employer tendered a proposed contract consisting of a marked up version of the old contract showing where it proposed to eliminate provisions and where it proposed to add provisions. Sulds asked that the Union prepare and submit a comprehensive contract offer in response.

At this meeting, the parties discussed the employer's multiplatform/flexibility proposal and the Union's position was that this could be agreed to if the company recognized the Union for the employees of the dot.com versions of the magazines. The company's position essentially was that it needed flexibility to assign employees to its various platforms and not be restricted to having employees working only at a single magazine. The Union's position essentially was that the company's proposal presented the unit employees with an undue risk of having jobs eliminated.

The parties went through all or most of the company's contract proposal and Sulds emphasized certain other proposals that were particularly important. These were, (a) that severance pay should offset any payments that would be required under the WARN act; (b) that the volunteer program be eliminated; (c) that part time employees would only receive contract benefits after working 20 hours per week instead of 17.5 hours per week; and (d) the elimination of rehire rights after employees had been permanently laid off.

In addition to the above, there was a discussion about the company's proposed to allow it to subcontract out the work of temporary employees without restriction.

The next scheduled meeting was cancelled so as to give the Union the opportunity to review the company's contract offer and to prepare a counter proposal.

On March 21, 2014, the parties held their 7th meeting. Although presenting a written counter proposal, the Union's offer did not contain any specific wage demands. Nor did it contain any proposals relating to medical or retirement benefits. Among the items proposed were the following;

1. The Union proposed to add union-security and dues-checkoff clauses.

2. The Union proposed to increase the minimum rates of pay.

3. The Union proposed that overtime be paid after 35 hours instead of the current 40 hours per week.

4. The Union proposed that seniority be the sole basis for layoffs and to eliminate the use of skills and abilities as a factor in layoff decisions.

5. The Union made an alternative proposal that would retain the volunteer process when layoffs were needed.

The 8th meeting was held on April 11, 2014. Sulds asked the Union if it had a comprehensive contract proposal and the Union's representatives stated that they wanted the Company to first respond to their March 21 proposals. The employer's representatives responded that it did not have any further proposals. After a caucus, the company rejected the Union's volunteer proposal, which union representative Napoli characterized as a "core area" of disagreement. With respect to the flexibility issue, the Union made a proposal that included that that there would be a 5-year period in which there could be no layoffs of unit employees by way

of a reduction in force. The Union's proposal on this issue also contained a number of other conditions, which can be read at Respondent Exhibit 21.[6]

Also, on April 11, the company notified its employees that there was a change in one of the many fund options offered in the 401(k) program. The 401(k) was available to all of its employees including Guild represented employees. The change involved the substitution of the Capital Preservation Fund by the Morley Stable Value Fund. Any money an employee had in the former would be transferred to the latter. Both funds apparently had substantially similar investment goals and this change was unlikely to have any measurable impact on unit employees.

The 9th meeting was held on April 17. At this meeting, the Union stated that subcontracting was an important issue because there were a lot of temporary employees. In response to the Union's flexibility counter proposal, the company stated that it could not commit itself to not lay off anyone for 5 years. The Union again took the position that if the employer was allowed to reassign employees from a covered magazine to its digital version, then those jobs should be covered by the Union's contract. The employer responded that if the Union wanted to represent the dot.com employees then it should file a representation petition. The Union repeated its concern that an employee transferred from a covered magazine to the digital version could be affected because he or she may be adversely evaluated after not having received the proper training. In this respect, the Union noted the experience of a writer from Sports Illustrated who voluntarily transferred to Sports Illustrated.com.

On May 7, the parties held their 10th meeting. The bulk of this meeting was taken up with a discussion of the mechanics of how the company's multiplatform/flexibility proposal would work. At this meeting no new proposals were made by either side.

The parties resumed negotiations on the following day (The 11th meeting). The company agreed to extend the contract until July 31, 2014, but stated that this should be the last time for an extension. Much of the discussion dealt with proposed changes to the investment options in the 401(k) plan. The company stated that it was going to change its match from 7 to 5 percent. This, would if implemented, be a significant change to the employee's wages and benefits. In this respect, the evidence is that the employees of Time Inc. including the represented employees had been covered by the Time-Warner 401(k) plan. Therefore, when Time Inc. was to be spun off from Time-Warner, it no longer could participate in the latter's 401(k) program and had to arrange for new investment options and devise a new plan. The evidence shows that in November or December 2013, the Union was notified that there were going to be changes in the 401(k) plan and that some time later, it was notified the company intended to reduce its match from 7 to 5 percent. So this came as no surprise when it was discussed at the May 8, 2014 meeting.[7]

In addition to discussing proposed 401(k) changes, the Union's representative stated that it was not interested in the company's proposal for subcontracting of temporary work.

[6] It is important to note that I make no judgment as to the merits of either the company's or the union's contract proposals insofar as they relate to mandatory subjects of bargaining. Whether they are good, bad, or indifferent ideas, is beyond the scope of my inquiry.

[7] After this meeting, the employer, on May 9, forwarded information to the Union regarding the 401(k) plan.

On May 15, the Union sent an email requesting information for the purpose of developing a medical plan.

On May 16, the company sent out a memo to its employees stating that the split would take place on June 6, 2014. It also stated that the Time Warner Stock Fund would be changed to the Time Inc., Stock Fund and that employees who had invested in the former would receive a one-time dividend in the form of Time Inc. common stock.

The 12th meeting was held on May 16, 2014. This meeting involved discussion by the parties of the 401(k) changes and whether the Union should have a role in choosing investment vehicles. Also, there was more fruitless discussion of the company's multiplatform/flexibility proposal.

Following the meeting on May 16, 2014, representatives of the Union and the company had phone conversations and exchanges of emails on various issues. Among other things, the company sent additional 401(k) plan information that was relevant to the upcoming spin off.

On June 5, the parties held their 13th meeting. At this meeting there was further discussion of the 401(k) plan and how it would be impacted by the fact that Time Inc. was to be spun off from Time Warner on June 6.

The 14th meeting was held on June 11, 2014. The company made a response to the Union's March 21 proposal on flexibility. In substance, the company proposed that it should have the right to assign unit employees across brands and platforms. The company made a proposal that would offer employees involuntarily reassigned, a training period and a 3-month period during which they could not be adversely evaluated. In response, the Union asked that the company recognize it insofar as those people employed by the dot.com versions of the magazines covered by the collective-bargaining agreement.

The 15th meeting was held on June 13, 2014. Much of the discussion related to the multiplatform/flexibility issue. In substance, the Union stated that it would agree that writers and photographers could be involuntarily assigned from their magazine to the digital version of the magazine or to any other brand even if not covered by the collective-bargaining agreement. The Union's position was that this would only apply to these two categories of employees. Also, the Union's proposal contained a host of job protection rules including a provision that job evaluations in a new job could not be used against any reassigned individual for a 12-month period. The Union's proposal was that if a bargaining unit employee was involuntarily assigned away from his magazine to an unrepresented entity, he or she would nevertheless be covered by the terms of the collective-bargaining agreement.

In addition, the Union asked for a guarantee that subcontracting would not affect any bargaining unit employees. The employer rejected this, but offered to notify and consult with the Union before any subcontracting decision was made. During this discussion, the Union referred to an entity called YOH and the employer's representative stated that although the company was using this company as a temporary sourcing agency, he was not aware of any Guild jobs having been subcontracted to YOH.

On June 18, the company tendered another proposal regarding the multiplatform/flexibility issue. In substance, this gave the employer the unlimited right to assign unit employees across brands and platforms. The company agreed to a 4-month training period for involuntarily reassigned employees and it also agreed that such employees would be

insulated from layoffs for a period of 4 months after a permanent reassignment. The company's proposal included provisions that if a bargaining unit employee was reassigned outside of the unit; he or she would not suffer any reduction in pay and would be covered by the collective-bargaining agreement. However, if a unit employee volunteered for a reassignment to an entity not covered by the contract, then he or she would not be covered by the labor agreement.

Also on June 18, 2014, the Guild made a request for information. This was sent to the employer and read as follows:

> The Guild has leaned that some temps performing work in Guild jurisdiction have been placed on the payroll of YOH, a temp agency Time has contacted with to provide temporary employees. Since Time Inc. has a proposal seeking the right to subcontract work within Guild jurisdiction this development is very disturbing and the Guild requests the following information so we may investigate the issue to determine the extent of the issue. Please provide the Guild with the following information
>
> A complete list of all temporary employees employed since January 1, 2014 to present, including mailing address, email address and phone numbers.
> The date of hire for each temporary employee
> The job title of each temporary employee
> The hourly salary of each temporary employee
> The product (magazine, website, etc.) each temporary employee was hired by.
> The name of the manager or direct supervisor of each temporary employee
> A copy of any contract between Time and YOH
> A copy of any contract between YOH and any temporary employee
> Payroll records from January 1, 2014 to present for all temporary employees working for Time and/or YOH including the number of hours worked and he wages earned for such hours.
> A complete list of any benefits offered by YOH to temporary employees including but not limited to medical, pension, 401(k), sick time, vacation, etc…

The 16th meeting took place on June 19. Not much progress was made on any major issue. There was discussion about subcontracting and the flexibility issues. Also, the company withdrew one of its original proposals that would have allowed it to implement company-wide policies that would also apply to unit employees.

The next and 17th meeting did not occur until July 16, 2014. The Union made a counter proposal on subcontracting that would, in effect, limit the amount of subcontracting and insulate employees from the effects of subcontracting should that occur. Among other things, the Union proposed that subcontracting be limited to 10 percent of employees in a job category or department. It proposed enhanced severance pay in the event that employees lost jobs as a result of subcontracting. The Union proposed that employees whose positions were affected by subcontracting should have the right to be transferred to any open positions elsewhere, subject to subsequent termination if that individual was unable to perform the job.

In addition, the Union proposed that the company adopt for the unit employees, the medical plan offered by another union called the United Furniture Workers. This was a medical plan for a different industry and among other things would have required the employer to permit the plan's trustees to increase contributions as they saw fit.

For its part, the company reiterated its demand to eliminate the volunteer process when layoffs were required. As noted above, under the expiring contract, if there were layoffs, the company had to ask for volunteers and accept 90 percent of those who volunteered. The company explained that this process impinged on its ability to pick and choose whom to retain when layoffs occurred.

As to the multiplatform/flexibility issue, the Union reiterated its position that in exchange for allowing the company to assign employees from covered magazines to the dot.com versions of the magazines, it wanted the company to extend recognition to the union for the unrepresented employees.

The 18th meeting took place on July 17, 2014. The company made a revised multiplatform/flexibility proposal. It still contained the right to assign across brands and platforms. However, the company agreed to a training program for anyone involuntarily reassigned and that for a 4-month period, that employee could not be laid off or adversely evaluated. The company's proposal was that any person involuntary reassigned would not suffer a reduction in pay and would work under the same terms and conditions as contained in the collective-bargaining agreement. However, a person who voluntarily transferred out of the bargaining unit would not be covered by the collective-bargaining agreement.

In response, the Union made a new counter proposal. It agreed to allow the company to assign unit employees to any product, platform, or brand as long as the employees worked within their original job titles and the work was assigned by an employee's direct supervisor. The Union's proposal was that employees would not be evaluated in the new job for 8 months and that, with some exceptions, they would be immune from layoffs for a period of 12 months.

Also at this meeting, the company reiterated its rejection of the Union's proposal that it be recognized for the employees of the internet based magazines.

Finally, the company rejected the Union's proposal that the employer adopt the Furniture Workers Health plan for the bargaining unit employees. It stated that its intention was to provide a health care plan that would provide all of its employees with multiple options.

The 19th meeting occurred on July 21, 2014. The company made concessions on its proposals concerning salary bands and withdrew its proposal to eliminate a bonus for night work. The employer then made a new subcontracting proposal which by its terms, would protect any transferred employee from layoff for 4 months; would require a 60 day notice and consultation period before any decision was made to subcontract; would provide for enhanced severance pay for individuals who lost their jobs as a result of subcontracting; and would limit the number of full-time positions affected so that the number of full time positions could not fall below 35 percent.

The company also withdrew a couple of its other proposals relating to overtime eligibility and the waiting time for benefits for new hires.

During this meeting, the company made an offer that employees would receive a lump sum of $500 at the time of ratification and an additional payment of $500 on each anniversary date thereafter. The Union rejected this wage offer and Napoli stated that no one was signing an agreement for $1000.

Further fruitless discussions also took place regarding the company's multiplatform/flexibility proposal and the Union's voluntary recognition proposal.

The 20th session took place on July 22, 2014. The Union tendered a comprehensive contract proposal, which for the first time, included economic terms such as a proposal for raising the minimum pay rates. As part of this package, the Union amended its counter proposal regarding subcontracting by increasing the proposed limit on the number of jobs subcontracted from 10 to 15 percent. As to this issue, the company countered with a proposal to limit subcontracting to 40 percent of the work force. (It should be noted that this is a proposal on general subcontracting that could affect regular and not temporary employees. The company maintained its position that it should be allowed to subcontract temporary work without limitation).

At this meeting, the Union's representative repeated its opposition to the company proposal to eliminate the volunteer process, stating that they were not moving on this issue. For its part, the company continued to assert, as it had from the start of negotiations, its desire to eliminate the volunteer process. The Union proposed that unit employees receive a 6 percent raise for each year of the contact and that the minimum wage rates be increased.

The 21st meeting took place on July 23, 2014. The company's representatives explained that they wanted to offer multiple options to employees regarding medical benefits and that the prospective plans had not yet been finalized. (As noted above, when Time Inc. was spun off from Time Warner, it no longer was a participant in Time Warner's benefit plans. It therefore had to establish new plans including a new health insurance plan and a new 401(k) plan for all of its employees, of which the bargaining unit employees were a small minority). At this meeting, the Union was told that when the company finally promulgates the new health plan, there would be one option that would provide the same level of benefits at the same cost level for the union represented employees. (By cost, this meant the cost to the employees and not the cost to the company). In addition, the company increased its offer of making a lump-sum payment, in lieu of a pay raise from $500 to $1000. Finally, the Union reiterated its demand to be recognized as the representative of the dot.com employees who worked for magazines that are covered by the collective-bargaining agreement.

The 22nd meeting took place on July 24, 2014. (The previously extended contract was set to expire on July 31). The parties reviewed a list of tentative agreements and then turned to the issue of flexibility. Consistent with its position all along, the Union linked any agreement on this issue to an agreement by the company to recognize the Union for employees who were outside the bargaining unit. After a caucus, the company presented a document that it described as an offer of settlement; stating that it was not a last offer. The company's offer included a proposal for a for a card check process to determine the wishes of the unrepresented employees.

The company's offer of settlement continued its proposal relating to the elimination of the volunteer process and continued its proposals relating to subcontracting of work done by regular employees and subcontracting of temporary employees. The company maintained its position on eliminating rehire rights, elimination of medical benefits for retirees, and on a number of other issues.

On the other hand, the company's offer did increase its previous wage proposals. The new proposal was for a $1250 upon ratification; a 1 percent increase on the first anniversary;

and a 1 percent increase in the third year contingent on other nonunit employees receiving a wage increase.

In response to the company's offer of a third year wage increase contingent on what other nonunit employees received, the Union asked for salary information for the nonunit employees.

At the conclusion of this session, the meeting for the following day was cancelled because the Union wanted to study the offer. Also, the company agreed to extend the contract to August 18. Bargaining sessions were scheduled for August 15 and 18.

On July 25, 2014, the Union made a written request for information. To the extent that the complaint alleges a violation of Section 8(a)(5), the allegation is that the company refused to furnish the information listed in paragraphs numbered 4 through 7 of the letter. In pertinent part, this states:

> In connection with the current contract negotiations please provide copies of the following information:
>
> * * * *
>
> 4. All contract(s) between Time Inc. and YOH.
>
> 5. A list of all individuals performing work for Time Inc. under the YOH contract, including names of individuals, salaries, number of hours worked, work assignments, and names of the manager assigning work to each individual covered under YOH contract.
>
> 6. A list of all individuals working for YOH who were previously employed by Time prior to working for YOH.
>
> 7. Payroll and other documents reflecting salaries and/or wages paid to all non-bargaining unit employees as of December 31, 2011 to the present… including increases and the dates of any increase was effective during those years, up to an including the present date.

As pointed out by the employer, neither at the meeting on July 24 nor in this letter, did the Union make any linkage between the relevancy of this information and the multiplatform/flexibility proposal that had been made by the company from the inception of bargaining 22 sessions ago.

It should also be noted that the complaint's allegations only assert that the company failed to furnish information encompassed by this particular request. The July 25 request overlapped the earlier information request made on June 18, 2014, insofar as certain information is sought regarding employees referred by a subcontractor named YOH.

On August 1, 2014, the parties exchanged a series of email messages reading as follows:

From Napoli to Sulds: Do you know the status of response on our information request? Also any idea when I will get the "settlement offer" in writing along with tentative agreement language and a list of withdrawn proposals.

From Sulds to Napoli: As discussed, they are working on gathering relevant responsive information and it will be provided shortly, as available. In connection with your request 7, as you know we await a statement of relevance along with any supporting authority. The information requested here is not typically subject to production as it does not relate to terms and conditions of employment for bargaining unit employees. We will evaluate the request in light of your response promptly.

From Napoli to Sulds: With regards to request 7, information on non-bargaining unit employees' salaries and increases, the relevance is your "settlement offer" tied bargaining unit employees' future increases to the increases non-bargaining unit employees may or may not receive in future years. I think we are entitled to the information so we may determine if that proposal is a viable option for our members. We mentioned to you across the table at our last session on July 24th when you put your settlement offer on the table, that in order to assess the wage proposal, we would need this information.

On August 8, the company sent a memorandum to the Union with attachments that provided much of the information that the Union had requested on July 25. . Among other things, the company stated that it was now offering a set of guaranteed wage increase with none being tied to raises given to nonunit employees. That being the case, the employer argued that the basis for the Union's request for wage and salary information for nonunit employees was no longer operative. As to the other aspects of the Union's July 25 information request, the employer did furnish information regarding subcontracting to YOH insofar as it may have involved work done by bargaining unit personnel.

On August 14, 2014, the employer sent over to the Union another large batch of information.

The 23rd bargaining session took place on August 15, 2014. At this meeting, the employer made a number of concessions and stated that it was close to its bottom line. Also, there was a dispute regarding the relevance of the information requested in item 7 of the July 25 letter relating to nonunit wages. The Union reduced its wage increase demand to 4.5 percent for the first year and 5 percent for the next 2 years. Although the contract was about to expire on August 18, the Union asked that the negotiations cease for the day because they needed time to evaluate the company's changed offer. The expiration date was therefore reset to August 27.

Also on August 15, the company sent to the Union a spread sheet comparing the contributions made to the 401(k) plan for employees when they were under the Time Warner Plan and what they were under the newly promulgated Time Inc. plan, This stated, inter alia, that employer contributions were now at a maximum of 5 percent of pay instead of the 7 percent that had been the case under the Time Warner plan. With respect to this change in the employer matches, it seems that this was first announced to employees back in January 2014.

The August 18 meeting was rescheduled to August 27.

On August 20, Sulds sent an email to Napoli that stated:

> When we met on the 15th I asked if the Guild had all the requested information needed to bargain (except those requests where the parties have legal differences) and you said you would check. Not having heard anything further from you I wanted to check back and close the loop. My assumption is that the answer is yes…. If that is incorrect please let me know right away so we can address the issue ahead of the 27th….

On August 22, 2014, the company distributed a memorandum to employees to the effect that it was substituting in the 401(k) plan one Blackrock index fund for another Blackrock index fund. (Fund M for Fund C). Both are foreign large blend funds and each had an expense ratio of .11 percent. Unlike the change in the employer contribution match from 7 to 5 percent, this change was inconsequential.

On August 25, the Union responded with an email regarding the information request. This now raised a completely different rationale for seeking salary and wage information for non-bargaining unit employees. (Item 7) This stated inter alia;

> Salary information is relevant to wage proposals, particularly in light of integration of work between bargaining unit and non-bargaining unit employees and Time Inc., proposal on flexibility allowing management to assign bargaining unit employees work for any publication or products the Publisher chooses.

On August 26, Sulds emailed a response. Insofar as Item 7, he noted that the Union had changed its rationale for the information and stated his belief that it "flies in the face of settled law."

The 24th bargaining session took place on August 27, 2014. The Guild presented a written comprehensive contract proposal plus a separate document, which was its response to the company's multi-platform/flexibility proposal. In essence, the Union's asked for an increase in the minimum pay rates and rejected a number of the employer's proposals including the company's demand to eliminate the volunteer process; the employer's position on eliminating rehire rights; the proposal to offset severance pay if WARN payments were required; and the company's proposal regarding the ability to subcontract the work of temporary employees.

In its proposal relating to the multiplatform/flexibility issue, the Union conceded the employer's right to assign not only within a brand to its digital version but also within all brands. The Union proposed giving employee reassigned, the necessary training and insulation from bad evaluations and layoffs for 6 and 10 months respectively. Its proposal was that the terms of the collective-bargaining agreement would follow an employee involuntarily reassigned, but that it would not if an employee voluntarily applies for a job outside of the Guild's jurisdiction.

The Union offered to increase the cap on subcontracting to 25 percent of the regular (not temporary) work force within a department or classification and tied it to a demand for enhanced severance pay and transfer rights in the event that regular employees were affected by subcontracting.

The company for its part increased its wage offer to 2 percent upon ratification; 2 percent on the first anniversary; and 1 percent in the final year. The company also reduced its position on subcontracting of regular employees by offering to place a cap at 100 full-time jobs and by increasing the amount of enhanced severance pay.

At the meeting on August 27, the Union reiterated its request for information regarding salary/wage information of nonunit employees who were employed by Time Inc. in the dot.com entities and for information as to all employees who were now employed by YOH. In both cases, the company's position was that these were requests for information about nonunit employees and were not relevant. And as to the YOH request, the evidence was that the company had provided its contract with YOH plus information as to the employees who were referred by YOH who had previously been employed at a magazine that was covered by the collective bargaining agreement.

When asked to explain the relevance of wage and salary information for nonunit employees, the Union's representative stated that if it agreed to a card check, and it turned out that employees in the related dot.com entities earned more than employees who were transferred to those entities from bargaining unit jobs, then any nonunion employee who was paid more would not likely sign a union authorization card. Thus, the reason posited by the Union for this information was not actually related to the wages of its represented employees; but rather to the likelihood of success it might have in organizing the unrepresented employees.

Indeed, I don't see why a request for past wage/salary information for these nonunit employees would be relevant to the negotiations covering the unit employees even if both sets did the same or equivalent work at the print magazines or the digital platforms to which bargaining unit employees might be assigned in the future. The company did not propose that if those assignments were made on a nonvoluntary basis, the unit employees would lose any of their pay or benefits as contained in the collective-bargaining agreement. That is, it agreed that the contract would follow them to any new assignments. What the nonunit employees earned is, to my mind, of little or no concern. And if the Union was so worried that nonunit employees might, in some cases, be paid more than unit employees, it could have proposed a provision requiring parity in the event that a bargaining unit employee is involuntarily assigned to a job working side by side with and doing comparable work to a nonbargaining unit person. Of course, the company could have rejected such a proposal. (It should be kept in mind that the old collective-bargaining agreement only called for minimum rates of pay and allowed for individual bargaining over that issue.)

Near the end of the meeting, the Union's representative stated that in order to develop additional responses to the company's proposal, it needed to have the information that had been requested *and that it would be making additional information requests*. In this regard, it should be noted that the parties had been engaged in bargaining since January 13, 2013 (19 months ago); that a very large amount of data had already been furnished to the Union on various subjects; that the employer had made it plain that it was not going to furnish information as to nonunit employees without a convincing explanation as to relevance; and that the contract, which had been extended on multiple occasions, was to expire on August 27, 2014. In my opinion, to assert at this late stage of the game that the Union needed more information in order to bargain effectively is highly suspect. More likely, the Union was not really seeking information that would be useful for bargaining but instead was demanding information in order to delay the possibility of an impasse.

The contract expired on August 27 and was not extended. Nevertheless, the parties continued to operate under the terms of the now expired contract until after the company made its ultimate final offer and implemented the terms of that offer. It should be noted that at this time, the company, in conjunction with its consulting firm, Towers Watson, had not yet finalized the health plan that was to replace the one that existed under Time-Warner.

On August 28, Sulds sent an email reiterating the company's objections to the July 25 information requests insofar as they related to nonunit employees. The following day, Napoli sent an email to Sulds asking him to set forth any legal authority for his position. On September 5, Sulds responded to Napoli's response of August 29.

The parties met again for the 25th time on September 10, 2014. At this meeting, the Union modified its wage demand to 4½ percent for each year with retroactivity. On minimums, it reduced its demand by $25 across all categories. The Union stated that it could unlink the subcontracting issues from its demand for an extension of jurisdiction to the dot.com employees. The Union's representatives also indicated that the Union wanted to have more protection for its members. More specifically, the Union's proposals were:

> 1. That no regular or full-time or part-time employees would be laid off if an intern or temporary employees was working the same or equivalent job or function in any brand.
>
> 2. That no Guild employee would be laid off if there were any available positions at any brand, product or platform.
>
> 3. That no Guild employee would be laid off if any non-guild employee was performing guild work.
>
> 4. That the company would not hire any intern, temporary employee or subcontracted employee in any brand, product or platform in the same or equivalent job or to perform the same or similar work.
>
> 5. That laid off employees would have recall rights for 52 weeks to any available position at any brand, product or platform anywhere in the company.

The employer asked if the Union had any additional proposals and the Union's representative said that they did not. The employer's representative asked if the Union had any flexibility on the volunteer process proposal and the union representative responded; "I don't think we have anything on eliminating the volunteer process and we are not in a mind to do that." As to the employer's proposal to eliminate rehire rights, Napoli agreed that the parties had a "conceptual gulf." The parties also continued to disagree on the employer's severance pay/WARN proposal and a couple of other issues.

With respect to the Union's protection proposals cited above, the company stated that it was not interested in increasing restrictions on layoffs and would not agree to guarantee employees who were laid off a right to similar or equivalent jobs elsewhere in the company. Instead, it offered a process whereby laid off employees would be given the opportunity, in conjunction with the company's human resource department, to apply for jobs that suited their skills as jobs became available. At the end of the meeting, the parties agreed to meet again on September 17.

The 26th meeting took place on September 17, 2014. At the outset, the company asked if the Union had any change in its subcontracting position and the Union replied that it did not. After the parties caucused, the employer presented a document that it described as its Last, Best and Final Offer. It is not my intention to describe the entire offer, but to the extent relevant, this provided the following:

1. A card check with limitations.
(a) No organizing for 18 months after ratification.
(b) A list of names and addresses to be provided by the company
(c) An arbitrator to check the cards
(d) That the card check occur 60 days after the start of organizing.
(e) That the company can campaign

2. Wage increase: 2½%, 2%, and 1%.

3. Ratification bonuses

4. The multi-platform/flexibility proposal

5. Elimination of the volunteer process

6. Elimination of the rehire provision

7. Subcontracting as described in an exhibit attached to the offer. [8]

8. WARN offset against severance pay

9. Severance capped at 52 weeks, etc.

10. The conversion of 4 project employees to regular employees.

11. The increase of the threshold for benefit eligibility for part-timers from 17.5 hours to 20 hours per week

Upon receiving this document, the Union's representatives stated that they believed that there still were key issues that needed to be worked on and that the information requests were still outstanding. They described the final offer as being premature. The Union asked the employer to provide a document showing the changes that were proposed in relation to the expired contract. (The parties refer to this as a red-lined document). The employer agreed to do so and it did. The Union reminded the employer that it not seen anything on health care plans and the company responded that "we don't have anything."

On the same day, Sulds sent an email to Napoli and the Union's attorney, asserting that because they had left the meeting, the employer considered that the parties were at an impasse.

[8] This stated that if the employer intended to subcontract work done by regular employees it would give the Union 60 days' notice; information related to the subcontracting and that it would agree to an discussion to seek alternative. It proposed that any employee affected by subcontracting would receive a 50 percent increase in severance pay and that the employer will attempt to transfer affected employees to other vacant jobs. However, the proposal was that the employer would guarantee only an interview. Additionally, the offer was that if an employee was transferred and chose within 3 months to leave, then he or she would get increased severance. Finally, the employer's offer was that no more than 60 full-time equivalent unit positions would be subcontracted within the term of the agreement. As to temporary employees, the employer continued to insist on its proposal that it have the unlimited right to subcontract.

The Union responded:

> We do not agree that we're at an impasse and there are outstanding unresolved issues … We are prepared to bargain today but instead received your "last, best, final" offer which, as you know, contained new terms for the first time. Now you're saying that unless we … immediately agree to your last, best, final offer, which contains new terms not previously proposed, that you will consider it a rejection and an impasse. We said repeatedly that we would consider the company's last best final offer which is why we requested a document which sets forth the co-pay's offer with specific language which he negotiating committee can review….

On September 19, the Union sent the following message to the company. In somewhat summarized form, this stated:

> [Y]our repeated threat that unless the Guild…. approves the Publisher's "last, best, final offer" … you would consider it rejected and declare impasse, is an obvious attempt to foreclose bargaining and manufacture an impasse when it doesn't exist … You acknowledged that the Publisher's medical benefits proposal was incomplete and that you were still waiting for information regarding the proposal from your client. You have never responded to the Guild's 401(k) proposal and the approximate $400,000 in unpaid contribution. Your claim that the $1250 ratification signing bonus addresses the 401(k) monies and retro payments is not credible or an appropriate response. The $1250 payment is described as a ratification bonus and not compensation for retroactive wages or unpaid 401(k) contributions. The publisher's … offer also contains proposals covering permissive non-mandatory subjects …. The Guild… has neither accepted nor rejected the last, best and final offer….You have ignored the Guild's outstanding information requests and pending unfair labor practice charges. It should also be pointed out that the Publisher's… offer does not accurately reflect all of the tentative agreements between the parties, contains a significant change in the Publisher's position on subcontracting … and puts at least one proposal (multiplatform) in a side letter that was never discussed. It would have been much more constructive for you not to make your new proposals particularly your new subcontracting proposal (which significantly reduced the number of possible subcontracting layoffs from 100 to 60 FTE's [full time employees] which is much closer to our 25% proposal in the context of a "last best final offer" so that we would have the opportunity to respond. Instead, you effectively put a gun to the Committee's head and threatened an impasse if it was not recommended. Since we have not reached an impasse, are considering your last proposal and have not exhausted negotiations, we strongly urge the Publisher to withdraw its "last best final offer" and return to the bargaining table.

On September 19, Sulds responded and stated that there had been 25 bargaining sessions over 18 months.

On September 22, there was an email chain between Napoli and Sulds. This was as follows:

From Sulds: The committee members will be released as requested. However, your request for committee members to take time to "give the offer proper consideration" emphasizes that such consideration has not yet been given notwithstanding the presentation of the Last… offer on September 17… As previously stated, it is now abundantly clear that the Guild has been engaged in delay tactics which amount to surface bargaining…

From Napoli: [T]he committee is meeting to discuss the offer and ensure all of the tentative agreements you incorporated into the document are accurate and language we agreed upon ... I can tell you that I know of at least one tentative agreement that contains errors which I discovered and the committee members have indicated there are others in the document. The voluntary dues check off letter is incorrect and Section 5 of that article is also incorrect…. The Guild has not delayed during these negotiations. If there have been any delays, it has been on the part of the publisher. The guild presented a very detailed medical proposal, you asked for additional information on that proposal and the Guild responded with answers to those requests, both after a caucus with some answers, and the very next day provided you answers to the remainder of those outstanding requests. In contrast, the Guild has asked for specific information on the Publisher's medical plans for 2015. To date you have not provided one piece of information on the plans that will be offered to our members; instead you keep telling us you have no information. You expect the Guild to settle a contract and just trust the Publisher will provide for our people.

That has not worked out so well for them in the past as evidenced by the so called "mirrored" 401(k) plan which has turned out to be anything but. The Guild has a right and obligation to our members to ensure the document provided, accurately reflects the tentative agreements we have reached. This is not a delay tactic, just prudent and doing my job….

On September 24, 2014, Sulds replied as follows:

At no time did the Publisher ever acknowledge that its medical proposal was incomplete. Indeed, that proposal is to continue in effect language which has been in the parties' agreement for at least a decade. In a nutshell, it calls for the Guild unit to receive the same medical insurance as other employees at Time. What we told you is that the Publisher did not yet have definitive information with respect to what that medical insurance, with all choices available, will look like for 2015; importantly however, the last, best and final offer also promises for 2015 that there will be at least one medical benefit option at the same level of coverage and the employee contribution as the medical coverage provided in 2014.

Second, it is inaccurate to say the Publisher never responded to the Guild's 401(k) demand … [I]n early August, it told the Guild that all Guild proposals which were not then TA'd were rejected. Further, at frequent grievance sessions, the Publisher has repeatedly rejected the Guild's claim because there is no contractual or legal basis for it. And asserting that there was no response to the 401(k) proposal ignores that the Guild's insistence on it now is regressive bargaining. As I previously wrote to Anthony …. on August 28, at that time, in presenting a proposal on which the Publisher relied to make significant moves in

its own bargaining position, the Guild made no mention of any 401(k) proposal. Only later, when this was pointed out, did the Guild say that its failure to mention the issue was "inadvertent." That's not inadvertence; it is bad faith bargaining.

Now to the surface bargaining in which the Guild has engaged by failing … to respond to the last, best and final offer. That offer made changes to wages, added a ratification bonus and modified the ceiling for subcontracting as well as the severance. Those changes were … a logical outgrowth of the Publisher's prior position. Yet the Guild did not respond on September 17 and simply abandoned the bargaining table. To date, for all your writings, the Guild has … refused to respond….

You say there are errors in the redline and that all TA's [tentative agreements] are not accurately set forth … We specifically told you that if we have not captured the TA's accurately, we would include anything missing…. And significantly, the Guild has had a statement of TA's since early August and has never once said that what was included there was inaccurate.

That said … if there are inaccuracies in the TA list, they will be corrected. And if you think there are errors in the redline, you are free to call them to our attention….

Now as to the Guild's feigned surprise at receiving a last best and final offer. Since early August, the publisher has been telling you that it is close to such an offer. With each change of position over the 6 weeks preceding September 17, the Publisher told the Guild that it is almost at that stage….

Are the parties at an impasse? You both say no, but point to no specifics. Will the Guild agree to the Publisher's subcontracting proposal? Will it agree to the proposal to eliminate the volunteer process? Will it agree to the proposals to eliminate rehire rights, or for WARN offsets to severance, or the Publisher's proposal to continue medical benefits language, or to new hire schedule for vacations, or as to temporaries outsourcing, or any of the other aspects of the last… offer? Those are yes/no questions which the Guild's regressive bargaining, persistent surface bargaining and delay cannot eliminate. At no point in these negotiations has the Guild said, or indicated… that its answer to any would be yes. At no point in these negotiations has the Guild deviated from its diametrically opposite position, that it will not agree to the Publisher's proposals in these areas.

Rich's letter says that the last, best and final offer contains permissive subjects of bargaining. If what that means is that you refuse to bargain over some matter, then please identify it specifically and state that you have refused to bargain about it.

On September 26, 2014, the Union's counsel sent a letter to Sulds which stated in pertinent part:

We strongly disagree with the factual assertions and legal positions that you have taken …. I have previously indicated that your inclusion of permissive subjects in the "last, best and final offer" precludes an impasse. … We

> expressly reject and object to the publisher's inclusion of permissive subjects in what you have described as its "last best and final offer." Specifically, we reject and refuse to bargain over permissive proposals… including the following:
>
> Article III, Section 1. Deletion of last sentence regarding scope of Guild's representation.
>
> Multiplatform personal assignment and utilization proposal in proposed side letter No. 5.
>
> Card check proposal in proposed side letter No. 6.
>
> Article XVI addition of language in Section 9 refusing to negotiate and accept any suggestions of Guild representatives regarding office space planning in new location at 2 Brookfield Place….
>
> WARN Act set off proposal in Article XXI, Section 2(e).

On September 26, 2014, Sulds sent Napoli an email with attached slides describing the company's newly adopted health insurance plan. This stated:

> Attached are slides describing the Time Group Health Insurance Plan. As you will see, the new health and wellness plan is overall, an enhancement from the 2014 plan – with more choice and more purchasing power to give the employees the flexibility to purchase the plan that best meets their needs and budget. Because the Publisher and the Guild have not concluded a new CBA, the Publisher is bound under the Act, by the terms of the expired CBA. Accordingly, this constitutes notice pursuant to the terms of Article XIV of the now expired CBA. In all events … the Publisher is prepared to discuss the changes and the reasons for them with the Guild before making any such changes and before the scheduled open enrollment period applicable to the bargaining unit.
>
> In order to allow the Guild to review this information, this is to notify you of two things. First, although the open enrollment period for Time employees not in the bargaining unit is scheduled to commence on November 6, for those represented… it will be scheduled to commence 60 days following today, on November 23. The Publisher believes that under the terms of Article XIV, its notice obligation is only 20 days because of the enhanced terms of the plan, but will provide the 60 days' notice, without prejudice so that even if the Guild were incorrectly to take the position that the terms of Article XIV(2) (a) apply, the provisions of that section would be satisfied. However, if the Guild desires that Guild represented employees be included in the November 6 start for open enrollment, Pease so notify the Publisher.
>
> Second… in order for the Guild to have additional time to review these materials for the purposes of collective bargaining, the Publisher hereby amends its last, best and final offer such that the ratification bonus will be available, if and when the Guild ratifies [it] no later than October 15.

On September 29, 2014, the parties held their 27th meeting. The employer increased its wage offer to 2.5 percent upon ratification, 2.5 percent at the first anniversary and 1 percent at the second anniversary. Also, the employer withdrew its proposal linking severance pay to potential WARN payments. More importantly, the employer withdrew its multiplatform/flexibility proposal.

What a surprise.

The multiplatform/flexibility proposal was one of the company's core issues from the very start of the negotiations. No explanation was offered and one can only speculate. In any event, by withdrawing this proposal, the amended reason for the Union's information request (item 7) relating to nonunit employees was no longer operative. Additionally, since the information would no longer be relevant (if ever relevant), it therefore can no longer be asserted that a declaration of impasse would be invalid because of a failure to provide this information.

At the September 29 meeting, the Union made a counter proposal to the employer's offer to cap the number of regular jobs that could be subcontracted. The Union proposed that full-time or part-time employees with 5 plus years of service could not be dismissed or suffer a reduction in classification as result of decision to subcontract. It also proposed a cap on subcontracting of 50 full-time jobs over the contract term with no more than 15 during the first two years and no more than 20 in the final year. Additionally, the Union reduced its wage demand to 3 percent per year. The Union rejected the employer's proposal on rehire rights.

On October 9, 2014, the company filed an unfair labor practice charge against the Union alleging that the Union was engaged in bad-faith bargaining. That charge was ultimately settled with a nonadmission clause on August 15, 2015. The Union agreed that it would not "refuse to bargain collectively with Time Inc. over subjects of bargaining that are inextricably intertwined with mandatory subjects of bargaining."

On October 10, the Union held a ratification vote and the company's final offer was rejected.

The 28th meeting was held on October 20, 2014. When this meeting opened, the Union's representative stated that it had no new counterproposals. At this point, the company's representative went through the Union's September 29 proposals and stated why the company would not accept them. On the major issues to date, the company rejected the Union's idea that if an employee lost his or her job as a result of subcontracting, that person would have a guarantee of being placed in any open similar job anywhere in the company. The company continued to insist on eliminating the volunteer process when layoffs were needed. Also, the company continued its proposal giving it the absolute right to subcontract out temporary jobs.

At one point the company's representative asked what it would take for the Union to accept its final offer. The Union's representative responded that it could do so if the company agreed to the following conditions. The Union proposed a guarantee of transfer rights to employees affected by subcontracting. It proposed an increase in the minimum pay rates. In exchange for giving up rehire rights for new employees and the elimination of the volunteer process, the Union proposed enhanced severance pay and the retention of rehire rights for current employees. At this point, Sulds said that this was not acceptable and stated, "it's pretty clear we're at impasse." In response, the Union's representative stated that the Union had communicated a willingness to make movement and suggested that there was an "ideological divide." The Union proposed mediation and the company stated that it was not interested in

mediation although it recognized that the Union had the right to involve the FMCS. Near the end of the meeting, the employer stated that it had reached its final offer and the Union's representative stated "we're waiting to see if there is something new. We have no specifics."

In a series of additional self-serving messages, the attorneys for the Union and the Company set forth their respective positions regarding the status of the negotiations. It would not be surprising to me that each side was now seeking to lay its respective foundation for future litigation.

On October 21, the company wrote to the Union. In somewhat abbreviated form, this read as follows:

> I write to confirm that the parties are at an impasse. Yesterday afternoon, the Guild's counsel stated that there was a logjam… The publisher must have the ability to position itself for growth and success – not just for the 200 members of the Guild, but for all Time Inc. employees worldwide. From the outset, the publisher has been committed to …. bargaining as evidenced by more than 25 meetings over the course of 18 months and the numerous agreements to extend the current collective bargaining agreement. Over the past several months, the Publisher has repeatedly enhanced its wage offer and dropped proposals of significant importance … While the Publisher has been stating for months the need to move forward … the Guild has not shown any flexibility to compromise on key issues, repeatedly rejecting the Publisher's proposals.
>
> Almost three weeks ago, the Publisher provided the Guild with a Revised Last Best and Final Offer. The Guild submitted that to a ratification vote on … October 10 and it was voted down….
>
> As yesterday's meeting opened, the Guild informed the Publisher that it did not have "anything new" in the way of proposals and maintained that the Publisher had not discussed the Guild's proposal of September 29, 2014. That statement is not accurate. After a caucus, the Publisher reiterated that it had in fact discussed and provided the Guild with its position on the September 29th proposal … but would respond to it again. The Publisher then went through the Guild's September 29th proposal, point by point, in each case reminding the Guild of the specific reasons that the proposal was not acceptable.
>
> **Subcontract**ing …The publisher explained to the Guild that the Guild's proposal was not acceptable because of the caps (overall and annual) which are insufficient to meet the Publisher's needs and the requirement in the Guild proposal that employees who are impacted by subcontracted be guaranteed a transfer to an open position (whether within Guild jurisdiction or not), because the Publisher is not in a position to guarantee jobs. We expressed … that we needed to reserve the right to consider the best candidates for the role, (which may, but may not be a Guild member impacted by subcontracting). We noted that the Publisher's proposal already contains items to mitigate the impact of subcontracting, including guaranteed internal interviews … and the ability to transfer to a job within Time Inc. under the described conditions. It is of further note that we have discussed the Publisher's position on these points numerous times

throughout the negotiations because the substance of the September 29 proposal was outlined by the Guild months ago. Also related to subcontracting is the Publisher's proposal to subcontract temporary workers. Here we reiterated that if a proposal did not provide for subcontracting of temporaries so that the Publisher could obtain temporary employees from a temporary agency rather than hiring them directly, it would not meet the Publisher's need.

Volunteer Process and Layoffs. The Guild's proposal with its additional notice periods and increased severance, do not work for the Publisher because it does not solve the problem because it creates operational obstacles as well as additional cost. The Publisher also rejected the Guild's proposal that would limit layoffs when there were open positions at Time to which an impacted employee might theoretically transfer because this too seeks a guaranteed transfer which the Publisher has rejected.

New Hire Vacation Schedule. The publisher pointed out that the new hire vacation schedule the Guild proposed was different from and more expensive than that in the revised Last, Best and Final offer and it was therefore rejected.

Minimum Pay. Finally, the publisher explained that an increase in minimums was not supported by market conditions …. Thus, as it had on September 29th, the Publisher rejected the proposal.

The publisher asked the Guild whether there were any circumstances under which the Guild could agree to the Last, Best and Final offer. After a caucus, the Guild responded that it could do so provided that the following elements in the Guild's subcontracting proposal that had been rejected by the Publisher and discussed immediately before the cause were part of the package:

1 Guaranteed transfers.

2. Increase in the minimums.

3. Increased costs related to wages, retroactivity, financial considerations to the unit for elimination of rehire rights and severance increases for elimination of the volunteer process.

The Guild also told the publisher that under no circumstances would the Guild agree to the Publisher's multiple classification proposal or accede to the actions taken by Time Warner with respect to retiree medical benefits provided to the Publisher's employees.

* * * *

As your counsel stated, there is a logjam. The parties are separated by significant conceptual differences on guaranteed transfers, increases in minimums and overall costs. Plainly stated, if there is no way that the Guild can agree to the Publisher's Last, Best and Final offer except by proposing

that the Publisher undertake what it has already advised that it cannot do, that really is a log jam which is why an impasse exists.

The Guild advised … that it had no new proposals to offer but suggested the parties retain a … mediator…. The issue is not communication. The issue is that the parties just do not agree.

The Guild has had the revised Last, Best and Final Offer for almost three weeks in which time it has voted against ratification. The Guild could have proposed mediation at any time. … The Guild did not consider using mediation until the parties reached an impasse. That said, as we told you yesterday, the Guild is free to do what it chooses in terms of contacting FMCS….

On October 22, 2014, the Union responded as follows:

Your repeated claim of impasse … does not make it so …. As previously stated, there is no impasse since the Publisher has failed to bargain [on] numerous subjects … including the Guilds' pension proposal, has failed to respond to information requests, has failed to respond to numerous Guild proposal other than to say they don't meet the Publisher's interest and has prematurely made a "last best final" offer which included proposals for the first time which the Publisher had incorrectly labeled as tentative agreements. You claim that the Publisher has been bargaining for 15 months when in reality the Publisher only recently made a number of proposals including a wage offer (i.e. end of July).

During this past Monday's bargaining session, we took you up on your offer to describe "circumstances under which the Guild could accept the last, best and final offer. The Guild went through the … offer and outlined "circumstances including economic terms and job protections." In response, you stated that the Publisher was not interested in anything we had to say and was sticking to its last, best and final offer unchanged. You also failed to respond to any of the Guild's outstanding proposals and counter-proposals, which are still on the table. The parties had a discussion about subcontracting and your misleading characterization of the Guild's subcontracting counter proposal as seeking a "guarantee" of work. We tried to dissuade you of this misleading characterization but you would not move off of it. I proposed mediation … I suggested that a meditator could assist us in breaking the "logjam"… and believe I gave the subcontracting proposal as an example where a mediator could make some procedural suggestions for us to move past what appears to be the Publisher's incorrect view that the Guild is seeking job guarantees…. Again, you rejected my mediation offer out of hand and indicted that an FMCS mediator had already been appointed to our negotiations. I find it amusing that you've repeatedly attempted to seize on my reference to "logjam" on Monday as some kind of admission of an impasse. There is no impasse when the Publisher has refused to bargain in good faith and has failed to even discuss many of the Guild's proposals and counter proposals other than to say it is not interested….

On October 23. 2014, there was an email from Sulds to Napoli with attachments. This stated in substance that the attachments were further information with respect to the health plans. It stated; "I will shortly forward similar materials for 2 additional plan providers. Please note that in addition to the materials on the plans in this package, you will find a chart summarizing 2015 monthly contributions for guild members per salary band and location, on a plan by plan basis. Let me know if there any questions."

Also on October 23, the company sent to the Union materials related to the various health plan options that would be made available to employees. This was sent before they were announced to the employee. It is noted that at this time, the company had about 5000 employees, of which about 300 were represented by the Union. The documents described the insurance carriers for each plan, the options available (Gold, Silver, Bronze, and Safety net), plus copays, deductibles, premiums etc. At this time, plan summaries were not yet available.

On October 24, the parties exchanged emails and telephone calls regarding the health plans.

The 29th meeting was held on October 28, 2014. Also attending this meeting was a federal mediator. The Union asked the company what the company's costs were in providing the health plans and as far as I can see, the company rejected this. There does not appear to have been any movement by either side at this meeting, and the Union made no proposals of its own.

With respect to various information requests relating to health plans, I note that the complaint does not allege that the company violated the Act by failing to provide such information. Also, I don't see why information relating to the company's cost in providing health care benefits is at all relevant. The company had already offered a contract proposal whereby it agreed to include in any health program adopted, that the union represented employees would be given an option that would provide the same benefits at the same cost to employees as they had under the former Time-Warner plan. As far as the employees were concerned, what was relevant was the benefits they would be offered and what their costs would be.

For better or worse, the fact is that Time Inc. was required to come up with a new health program after it was spun off from Time-Warner. This took time. The new plan that was devised with the assistance of an outside consulting firm, was designed to cover all of the company's 5000 plus employees, including the 300 bargaining unit employees. It was perhaps unfortunate that the health benefit program was being designed at the same time that bargaining was taking place. And this, no doubt, placed the Union in the position that it could not know the makeup of the program until it was finalized. Nevertheless, the parties did manage to bargain about this subject, with the Union proposing another union's health plan to cover the bargaining unit and the company proposing that whatever plans were adopted, they would include an option by which unit employees could choose one with the same benefits at the same cost as they had under the previous Time-Warner plan. [9]

On October 29, Sulds sent an email to Napoli that essentially accused the Union of engaging in unlawful surface bargaining. He also stated that inasmuch as the Union had no new proposals, "it is plain that the impasse continues."

[9] Had the Union accepted the company's contract offer, it could have filed a grievance and sought arbitration if the option offered to the bargaining unit employees did not, in fact, offer the same medical benefits and/or the same employee costs as they had under the Time Warner plan.

The Union immediately responded by an email that stated inter alia;

> Time Inc. delayed sending information on the medical plan for several weeks if not months, claiming the documents were not ready…. The Guild did have some initial questions on Friday, which were answered but there is no way we could analyze 16 different plans in less than 24 hours. Even now we are still analyzing the information and may have additional questions with regard to the plans …. Once you provide the answers to our questions from yesterday we may have additional questions based on those responses...
>
> Item number 14 of your last, best and final offer, dated September 29, 2014, stated; "With respect to medical coverage, continue current contractual provisions. Publisher will provide for 2015, at least one medical benefit option at the same level of coverage and the same cost as the medical coverage that is offered by Time Inc." The Guild informed you yesterday that none of the plans being offered for 2015 are of the same level of coverage and the same cost. All plans being offered for 2015 have increased deductibles and increased out of pocket expenses…. The Guild hereby requests all documentation you are relying on as proof the Gold and Silver Plans are of the same coverage and cost to our members as the current 2014 medical plan. Pease provide that documentation along with the answers to our other questions before our next scheduled session on Monday November 3, 2014.

The 30th meeting was held with the mediator on November 3, 2014. This was now a little more than 2 months short of 2 years since bargaining commenced. The Union made a proposal relating to subcontracting of regular as opposed to temporary employees. Basically, the Union proposed a cap of 50 on the total number of full-time jobs that could be subcontracted during the term of the agreement, if the employer would agree to retain the volunteer process for layoff and also retain rehire rights. This was rejected by the company's representative who stated that it was still insisting on eliminating both the volunteer program and rehire rights.

There was some more talk about medical benefits and the Union sought to obtain information as to how much the plans would cost the employer. The company demurred, stating that its cost had been developed by a consultant and that the total cost numbers were proprietary. The Union claimed that the benefits being offered to the unit employees were not equal to those offered by the Time Warner program.

Sulds stated; "We are at the bottom line position. We are here to answer any questions about the offer [and] to listen to any new offers you make . . . But this proposal does not move us forward and we are still at an impasse . . . so I will ask if you have anything more you have to offer."

The Union's representative stated: "To say last, best, and final and not let us negotiate it is classic bad faith bargaining. You can't keep saying last best and final. It is premature. We have not bargained on many subjects here. You keep saying it. We tried to talk with you on medical or the proposal on subcontracting and you reject it. We are trying to come up with different avenues to make this work and you repeatedly reject it out of hand without negotiating, saying last best and final." That is not negotiation.

There then ensued the following dialogue:

Company: We did not come back with anything because we made a last best and final. If there was some proposal you could put forward that you thought would change our mind we would look at it …. You have proposals you have made. We have considered them…. What I am asking is, is there anything new you want to us to consider or do we understand the proposals you have on the table continue to be the same.

Union: We are not negotiating against ourselves.

Company: I need an answer.

Union: I answered. We are not negotiating against ourselves.

Company: Do you have any new proposals for us?

Union: We gave you subcontracting.

Company: Do you have anything else?

Union: Everything is on the table.

Company: Anything new to propose?

Union: You have your answer.

Company: I don't think I do. If there is, you can tell us. If there is not, you can tell us.

Union: We are waiting until we have all the information requested so we can respond. Right now you don't have all that information. So until we get all the information… we want a full response to our informational request.

Company: We are intending to, consistent with the agreement and the notice we gave [10] you to open enrolment on November 27.

On November 12, 2014, the company sent an email with attachments to the Union that contained information relating to the health care plans for 2015. These are contained in Respondent exhibits 93 through 96.

On November 20, 2014 the company sent a letter to the Union stating that it intended to implement its last offer effective on that date. This last offer is set forth in General Counsel Exhibit 80 and a summary of some of its terms is as follows:

1. Implementation of the health program that had been developed in conjunction with the consulting firm, Tower-Watson. This contained a provision that the bargaining unit employees would have an option to select a plan that would provide the same benefits, at the same cost to them that they had under

[10] The letter sent to the Union contained exhibits which detailed the employer's proposed contract proposals relating to temporary employees, subcontracting, and the retiree benefit change of which the Union had been notified back in September 2013.

the Time Warner plan. The unit employees were required to enroll in the new plan by November 27, 2014. [11]

2. Agreement to a list of tentative agreements that had been made during negotiations.

3. A wage increases of 2 ½ %, retroactive to October 1, 2014.

4. Elimination of the volunteer process for layoffs.

5. Elimination of the rehire provision.

6. Subcontracting:
(a) The employer has the right to subcontract regular jobs with a cap of 60, coupled with a severance pay proposal.
(b) The employer has the right to subcontract, without limitation, temporary jobs.

7. Changes to retiree health benefits as had been implemented by Time Warner in 2013.

8. New vacation entitlements for old and new employees.

9. A proposal for multi-classification pay.

10. A change in the number of hours needed by part-time employees for entitlement to medical and tuition benefits.

As in the prior last offer, this did not contain any proposal relating to the multiplatform/flexibility issue. I also note that some of the items listed above, although not referred to in my previous recitation of the facts, nevertheless had been discussed during the negotiation process. But these were not, in my opinion, as significant as those issues relating to the two categories of subcontracting and the employer's desire to eliminate rehire rights and the volunteer process. As to wages, once the parties started to talk about this subject, they altered their respective positions in a manner characteristic of normal bargaining. I can't say whether or not there might have been more movement on wages by either side had the parties come to an agreement on what I consider to be the core issues that remained intractable.

3. Events Occurring after the Declaration of Impasse

After the announcement on November 20, 2014, that the company was implementing its last offer, a number of employees were laid off by way of reductions in force. In doing so, the company did not first ask for volunteers; instead selecting those bargaining unit employees it wanted to be rid of. On December 5, 2014, the company laid off Margery Frohlinger and Patrick Yang. On various dates in 2015, Erica Campbell, Duane Pyuos, Thomas Lake, and Brian Cazenueve, were also let go without there first being an effort by the company to solicit volunteers.

[11] Obviously, the company could not be expected to hold off implementing the new health care program for the 5000 plus nonunit employees who no longer would have medical coverage after Time Inc. split off from Time Warner. As in the past, the unit employees were, by the terms of the contracts, included in the plans that were offered to the nonunit employees.

Also, in conjunction with these force reductions, the company informed the Union that it would accept voluntary resignations and there was at least one instance where a bargaining unit employee volunteered to be laid off in exchange for additional severance pay. Allan Sloan expressed an interest in resigning in exchange for a severance package. And the company, after drafting a severance agreement for him, forwarded it to the Union. In a conversation with Roxanne Flores from human resources, Napoli asked if by accepting Sloan's voluntary resignation, the company could retain either Frohlinger or Yang. The response was negative and the company asserted that the volunteer process had been eliminated. When the agreement between Sloan and the company was executed and sent to Napoli, he refused to sign it stating that this was not in accordance with the expired contract's volunteer process.

In January 2015, the company notified the Union that there would be some positions at Sport Illustrated that would be eliminated by subcontracting. The Union was also notified at various times that a number of unit employees had volunteered to resign in exchange for severance packages. With respect to Rebecca Shore, the Union was notified that she had volunteered to resign. Napoli then told the company's representatives that the Union would not agree to the company accepting her as a volunteer because the company had eliminated the volunteer process. Subsequently, the company representative had discussions with Shore regarding the terms of an offered severance package and this was ultimately agreed to by her without the involvement of the Union in this process. Similarly, in the cases of George Dohrmann, Valerie Georgoulakos, and Jennifer Broughel, all of whom volunteered to resign, the company discussed with them and ultimately offered them severance packages without the involvement of the Union.

On January 21, 2015, the company notified the Union that it had decided to subcontract out all photographer positions at Sports Illustrated. This affected the jobs of Robert Beck, Simon Bruty, William Frakes, David Klutho, John McDonough, and Albert Tielemans. Napoli asked the company to provide documents relating to the company's decision to subcontract the work of the staff photographers. The company rejected this request and notified the Union that from hence forth, the photography work would be handled by freelancers. It is noted that the complaint does not allege that the refusal to furnish this information was a violation of the Act. The allegation is that the company violated the Act by unilaterally implemented its final offer provisions relating to subcontracting in the absence of a valid impasse.

In April 2015, the Union was notified of two other subcontracting decisions that affected two unit employees, Anna Druzcz and Michael Korte. Thereafter in May, 2015, the Union was notified that there would be additional subcontracting in the premedia department. This affected Neil Clayton, Charlotte Coco, Brian Luckey, Po Fung Ng, Peter Nora, Barry Pribula, Hai Tan, and Vuane Trachtman. As in the prior instances of subcontracting regular unit employees, the company did not first seek volunteers as it would have done under the expired collective-bargaining agreement.

On October 20, 2015, the company sent a memorandum to all of its employees notifying them of changes to the health plans for 2016. Among other things, one change was that starting in 2016, employees who enrolled their spouses or domestic partners, were required to pay a surcharge if the spouse or partner was able to obtain health insurance through his or her own employer.

The Union responded on the same day. Its email stated:

> The Guild objected to changes to the imposed medical plan … [S]pecifically we object to the introduction of a monthly surcharge to our members if a spouse or domestic partner fails to enroll in the plan of another employer should he/she be eligible. The Guild is not interested in following "common marketplace trends" that will increase the members' out of pocket expenses or seek to encourage our members to remove a spouse or domestic partner from the current coverage.
>
> As you know the Guild did not agree to this plan as a result of a negotiated collective bargaining agreement. It was implemented after the company declared impasse illegally. It is the Guild's belief that Time doesn't have the right to make any unilateral changes to the implemented working conditions, including but not limited to changes to the medical plan which became effective on January 1, 2015. Please provide me with written confirmation that the changes described in the email bellow will not be applicable to employees working in Guild jurisdiction…

On October 29, 2015, the company responded as follows:

> Since the collective-bargaining agreement expired, the parties are bound to continue to operate according to its terms. Article XIV requires the company to provide 60 days' notice prior to open enrollment of any terms with the result would be a decrease in a benefit plan…. We provided such notice and are available to discuss with you the reasons for any of the changes we are making to the plans. Similarly, the 2015 plan changes were rolled out after the required notice under the expired agreement. Accordingly, the changes that have been communicated to you will be rolled out following the status quo procedures. Please let me know if you would like to schedule discussions.

III. Analysis

1. The Subcontracting Issue

The last contract between the employer and the Union did not contain any provisions covering the subject of subcontracting. Nevertheless, sometime in 2013, the company began to utilize an outsourcing company called YOH to furnish temporary employees. I believe that YOH mainly provided temps for magazines and internet based publications that were not covered by the collective-bargaining agreement. The record is not clear to me as to what extent, if any, YOH provided temporary employees to magazines that were under the purview of the collective-bargaining agreement.

From the very beginning of negotiations, the company proposed two different contract provisions relating to subcontracting. The first dealt with the right to subcontract out work done by the company's full-time and regular part-time employees. This generated a great deal of discussion over almost 2 years. The parties proposed and counter-proposed a variety of ways for the company to subcontract, while at the same time, protecting to an extent, the jobs of the regular employee. In the end, the parties could not agree on this issue, and the company implemented its last offer, which, among other things, gave it the right to subcontract up to 60 regular unit jobs during the term of the agreement.

The other subcontracting proposal was one in which the company would retain the absolute right to subcontract, without any limitation, the work that was normally assigned to temporary employees. At the time of the negotiations, there were approximately 100 temporary people working at magazines that were under the jurisdiction of the collective-bargaining agreement. There were also about another 200 employees who worked as full-time or regular part-time employees. In effect, the company was demanding that the Union waive its right to bargaining over any subcontracting decisions that affected temporary employees. Unlike the subcontracting proposals that related to full-time and regular part-time employees, there was not much discussion over this proposal. From the beginning, the employer insisted on a provision that would give it the right to subcontract temporary jobs and that position remained unchanged throughout the negotiations. The Union did not have much to say on this proposal except to finally assert, toward the end of the negotiations, that this was a nonmandatory subject of bargaining. The Union did not, as far as I can see, make any proposals to limit this type of contracting to companies that would pay its employees similar or equivalent amounts to what the temporary employees made when employed by the Respondent.

The General Counsel and the Charging Party assert that the Respondent violated Section 8(a)(5) by insisting, during negotiations, on a provision that would give it the right to subcontract work that was normally assigned to temporary employees. The argument is that this was a nonmandatory subject of bargaining because it could theoretically eliminate, via subcontracting, one category of employees that constituted about a third of the bargaining unit. The other categories are the full-time and regular part-time employees who would not be affected by this proposal. If I understand their position correctly, the logical extension of this position would be that the subject of subcontracting could no longer be considered a mandatory subject of bargaining, at least when an employer makes a proposal that would permit it to engage in subcontracting. I wonder if the General Counsel would take an equivalent position to the effect that when an employer, having a contract with a union, makes a decision to subcontract out bargaining unit work, it does not have an obligation to bargain. Would the legal obligation to bargain depend upon the number of employees affected?

In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that a decision to subcontract out work previously performed by bargaining unit employees, constituted a mandatory subject of bargaining. In that case, the employer had subcontracted out maintenance work for legitimate and nondiscriminatory reasons. Thus, the employer's rationale for the subcontracting decision was not relevant to the issue of whether it had an obligation to bargain about the decision.

After the *Fibreboard* decision, the issue of subcontracting was obliquely revisited by the Supreme Court in *First National Maintenance Corp. v. NLRB* 452 U.S. 666 (1981). There the issue involved the employer's partial closing of its business. The Court held that certain types of managerial decisions could be made without bargaining, if the decision involved a change in the scope and direction of the enterprise, even if it had a direct effect on employment. The Court attempted to define a test which balanced an "employer's need for unencumbered decision making with the benefit of collective bargaining for labor management relations." At footnote 22, the Court noted, "we of course intimate no view as to other types of management decisions such as plant relocations, sales, other kinds of subcontracting, automation etc., which are to be considered on the particular facts."

In *Torrington Industries,* 307 NLRB 809 (1992), the employer subcontracted work that resulted in the layoff of bargaining unit employees who were replaced by independent contractors. The Board concluded that subcontracting decisions similar to those in *Fibreboard*

were mandatory subjects of bargaining and did not require the burden shifting test utilized in *Dubuque Packing Co*., 303 NLRB 386 (1991), even if the decision was not motivated by labor costs. That is, the Board concluded that based on the Supreme Court's decision in *First National Maintenance*, supra, the Court had already struck the balance in favor of finding that decisions to subcontract required bargaining. Nevertheless, the Board did qualify its decision and stated;

> We agree that there may be cases in which the non-labor cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining. We do not reach that issue here, however, because the Respondent's reasons had nothing to do with a change in the "scope and direction" of its business. Those reasons thus were not matters of core entrepreneurial concern and outside the scope of bargaining.

In *WCCO-TV*, 362 NLRB No. 101 (2015), the Board was asked to decide if an employer's proposal was a permissive or mandatory subject of bargaining. The Board stated:

> It is well established that the assignment of work is a mandatory subject of bargaining. Accordingly, a party may insist to impasse upon the inclusion in a collective-bargaining agreement of a proposal dealing with assignment of work. That is so even if the work is currently assigned to employees outside the unit because such an assignment affects the bargaining-unit employees' terms and conditions of employment by reducing the amount of unit work. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (finding that subcontracting is a mandatory subject of bargaining)…. It is equally well established that "[u]nit scope is not a mandatory bargaining subject." *Bozzuto's, Inc.,* 277 NLRB 977, 977 (1985). Thus, a party to a collective-bargaining agreement may propose to bargain over the scope of the unit, but may not insist to impasse on that subject. *Taft Broadcasting Co*., 274 NLRB 260, 261 (1985).
>
> In *Antelope Valley*, supra, the Board recognized that in a situation where the unit is defined in terms of the work performed, a contract proposal concerning work assignment might well have ramifications for the scope of the unit, and vice versa, and that determining whether such a proposal is mandatory or permissive can present difficulties. 311 NLRB at 461. Therefore, the Board adopted a two-part test to deal with this situation. The Board first looks at whether the employer has insisted on a change in unit description. If so, then the proposal is a permissive subject. If the employer's proposal does not purport to change the description of the unit, the Board considers whether the proposal nevertheless deprives the union of the right to contend that the persons performing the work after the transfer are to be included in the bargaining unit. If so, then the proposal is a permissive subject. A proposal that does neither of the above, and instead grants the employer the right to transfer work out of the unit, is a mandatory subject of bargaining and the employer's insistence on it to impasse is lawful.

The General Counsel and the Charging Party rely on the Board's decision in *McClatchy Newspapers*, 321 NLRB 1386 (1996), and *Colorado UTE*, 295 NLRB 607 (1989). But neither of those cases involved subcontracting proposals. The facts in both of those cases involved

situations, unlike here, where the employer proposed contracts in which it retained total control over their wage systems. In that sense, those contract proposals were tantamount to offers of illusory contracts, at least insofar as wages were concerned.

It seems to me that the employer in the present case was seeking discretion to subcontract work done by temporary employees. It did not offer a proposal that would, by its terms, change the scope of the bargaining unit. Although it may be said that if an employer exercised a contractual right to subcontract temporary work during the contract's term, this could ultimately affect the composition of the bargaining unit. But this is not, in my opinion, tantamount to a demand that the scope of the bargaining unit be changed. Given that Court and Board decisions have consistently defined subcontracting as a mandatory subject of bargaining, I have difficulty seeing why it should be different here.

It is also asserted that even if the company's subcontracting proposals are held to be mandatory subjects of bargaining, the employer should nevertheless be precluded from implementing those proposals even in the event that there is a valid impasse. The General Counsel contends that this would apply not only to the employer's subcontracting proposal relating to temporary employees but also to its proposals regarding full-time and regular part-time employees.

The expired contract did not contain any provisions relating to subcontracting. Therefore, any decisions to subcontract unit work would have required the company to give the Union advance notice of such a decision and an opportunity to bargain about that decision. For better or worse, the company chose to avoid that process by demanding that it have the right, with limitations, to subcontract out the work of its regular employees. It also demanded the unlimited right to subcontract out work done by temporary employees.

Both of the employer's subcontracting proposals were on the table from the start of negotiations. And at least with respect to the proposal dealing with regular employees, the issue was the subject of much debate and multiple concessions by each side. In the end, the employer's final offer was for a provision that would allow it to subcontract work of full-time and regular part-time employees with a cap on the number of jobs that could be subcontracted; provisions for enhanced severance pay; and provisions requiring notice to the Union. As to the employer's insistence on the right to subcontract out the work of temporary employees, the record indicates that there was not as much discussion on this issue. Nevertheless, this proposal was on the table for almost 2 years. The Union clearly had an ample opportunity to bargain over this proposal.

I have concluded that the subject of subcontracting is a mandatory subject of bargaining. This means, a fortiori, that either party is entitled to insist on its position to the point of impasse or as a condition of reaching an agreement. If one were to conclude that contract proposals dealing with subcontracting could not be implemented upon an impasse, then what would be the point of having any discussions at all? The paradox would be that even though a company would be entitled to insist to impasse on a subcontracting proposal as a mandatory subject of bargaining, it could not implement that proposal in the event that there was an impasse. In my opinion, that is a result, which contradicts itself. The whole point of trying to obtain an agreement that deals with subcontracting is so that the company need not engage in prolonged bargaining (with multiple information requests), every time, during the term of the collective-bargaining agreement, it decides that it wants to subcontract out work done by unit employees.

I note that it is not within the Board's purview to decide whether a proposal made by either a company or a union is fair or unfair. There are to be sure, a small number of contract provisions that even if agreed to by both parties, are illegal. These would include hot cargo agreements, closed shop agreements, or clauses containing impermissible union-security clauses. And as to those types of contract proposals, a party that does not agree can insist that the other party drop its proposal. There are also a group of proposals that have been defined as permissive subjects of bargaining and as to these, the proponent may not insist on its proposal to the point of impasse or as a condition of reaching an agreement. *Borg-Warner Corp. v. NLRB*, 356 342 (1958). But except for these limited exceptions, it simply is not within the Board's jurisdiction to determine the merits or fairness of contract proposals made by either party to a negotiation. The Board is not empowered to engage in the equivalent of interest arbitration.

2. The Information Requests

The complaint's allegations are only that the company failed to provide certain of the information that was requested in the Union's letter dated July 25, 2014. The record in this case shows that there were other multiple requests for a variety of information, some of which was given and some not. But except for the information requested on July 25, the others are not alleged as violations of the Act.

To review, the Union's July 25 letter read, in pertinent part, as follows:

> In connection with the current contract negotiations please provide copies of the following information:
>
> * * * *
>
> 4. All contract(s) between Time Inc. and YOH
>
> 5. A list of all individuals performing work for Time Inc. under the YOH contract, including names of individuals, salaries, number of hours worked, work assignments, and names of the manager assigning work to each individual covered under YOH contract.
>
> 6. A list of all individuals working for YOH who were previously employed by Time prior to working for YOH.
>
> 7. Payroll and other documents reflecting salaries and/or wages paid to all non-bargaining unit employees as of December 31, 2011 to the present… including increases and the dates of any increase was effective during those years, up to an including the present date.

This information request covers two different issues and both ask for information about nonunit employees. And in that respect, the Board has held that information requests relating to nonunit employees are not presumptively relevant; that the requesting party has the burden of establishing that the information sought is relevant to a legitimate issue of bargaining. *Disneyland Park*, 350 NLRB 1256, 1258, fn. 5 (2007); *Hertz Corp.*, 319 NLRB 597, 599 (1995).

Items 4 to 6 relate to the company's demand to have the unlimited right to subcontract out work done by temporary employees. (At the time, the respondent was using a company

called YOH to provide temporary workers). The information requested on this issue, to an extent, asked for information, not only about nonunit employees, but also about people who are not employed by the Respondent.

Item 7 of the information request deals with wages since the company's July 24th wage proposal was that during the 3rd year of the contract, the unit employees would be paid the same percentage wage increase given to nonunit employees.

With respect to the request concerning YOH and the use of temporary employees, the following information was provided. The contract between Time Inc. and YOH; a list of the people who worked for YOH who had previously been employed by Time Inc.; the division to which those employees were assigned; payroll information; and a summary of benefits that YOH provided to its employees. The Respondent did not furnish information relating to YOH referred employees if they were not assigned to magazines or platforms not covered by the collective-bargaining agreement.

In support of the request for information, Napoli asserted that the reason the Union needed this information was because it had learned that some temporary employees who had worked on magazines covered by the contract had been hired by YOH and had been assigned to Time Inc. Napoli's position was that since the company was proposing that it should have the right to subcontract all temporary work, this information was necessary for the Union to develop meaningful counterproposals. After being furnished with the information described above, the Union repeated its request for the remaining information insofar as it would relate to utilization of YOH to provide temporary employees to magazines covered by the collective-bargaining agreement.

To say that information is relevant because it could be useful for making meaningful counters to the company's subcontracting proposal doesn't say anything at all. In what way would this type of information be meaningful? The issue on the table was a proposal that would give the company an unlimited right to subcontract work done by temporary employees. I don't understand how knowing how much a contracting company pays its employees will be used by the Union in its negotiations with employees of Time Inc. There was no assertion by the company that it would be cheaper to utilize an outside contractor to do this work or that it otherwise would save money on labor costs. There also was no contention or evidence to suggest that Time Inc. and YOH constituted a single or joint employer. Indeed, there was not much talk about this company proposal be either side.

Presumably the Union could have, without any information at all, made a proposal that Time Inc. require any contractor pay temporary employees used by Time Inc. similar wages and benefits as are paid to Time Inc.'s own employees doing similar work, so long as such a provision did not require the contractor to adopt the collective-bargaining agreement or adopt the identical terms and conditions of that agreement. That is, the Union could have proposed and the company could have agreed to (or rejected) a proposal that would mitigate against the comparative labor costs of subcontracting so long as it did not go so far as to be a violation of the hot cargo provisions of Section 8(e) of the Act.[12]

But this was not proposed and there was a singular lack of discussion of any potential alternatives to the company's subcontracting proposal relating to temporary employees.

[12] See *Laborers Local 25* (*RWKS Comstock*), 344 NLRB 751 (2005), for a discussion of the difference, in the context of Sec. 8(e), between union signatory clauses and preservation of unit work clauses.

In my opinion, the General Counsel's reliance on *Comar Inc.*, 349 NLRB 342 (2007), is inapposite. In that case, the employer proposed to transfer a group of bargaining unit employees to another of its own facilities where the employees were not covered by the labor agreement. The Union requested information during bargaining over the effects of the transfer for the wages, job and other information relating to the employees who might be transferred from the unionized plant and also as to the employees not covered by the contract. This information was requested and deemed relevant because it could be used by the Union to advise its represented employees as to the wages and benefits at the nonunion plant and give employees information that could be used to decide whether or not to accept a transfer. This is plainly not the case here. In our case, the company's proposal is not about transferring unit employees to another position within the company. Rather, it is a proposal that permits it to subcontract the work of Guild represented employees to an outside company, which may or may not hire some or all of the employees who had previously worked for Time Inc. at a magazine covered by the collective-bargaining agreement.

As noted above, the Union's July 25 letter requested, at item 7, wage and other information about nonunit employees. The initial request was made immediately after the company made a wage proposal that offered a 3rd year wage increase that would be contingent on any wage increase given to nonunit employees. Thus, this proposal linked unit and nonunit employee wage increases 2 years hence. As such, I don't see how the past history of wages and benefits for nonunit employees would be relevant to this issue. Nevertheless, even assuming that there might be some argument for relevance, the company immediately withdrew that proposal and substituted a fixed wage increase proposal that was not linked to nonunit employees.

When the company changed its wage proposal, the Union changed its reason for wanting this information. Now it claimed that the information was relevant in relation to the company's multiplatform/flexibility proposal. In this regard, the company from the start of the negotiations, wanted a contract that allowed it to assign bargaining unit employees who worked at magazines covered by the contract, to other magazines that were nonunion or to internet entities such as Sportsillustrated.com that were also not covered by the collective-bargaining agreement. The Union's rationale for wanting wage and other information for the nonunit employees was asserted as being based on the fact that if it agreed to the company's multiplatform proposal, then unit employees would be working side by side with nonunit employees doing the same or substantially similar work.

Since the Union does not represent the nonunit employees and is not authorized to bargain on their behalf, it is difficult for me to understand how information regarding those employees would be relevant to bargaining on behalf of the unit employees. So what if they are working side by side? The Union was bargaining for the employees in the unit; it was not authorized to bargain for employees outside of the unit. At all times, the company agreed that if a multiplatform clause was put into place, those unit employees who might involuntarily be assigned to work at nonunion magazines and/or platforms would continue to be paid the same and continue to be covered by the terms of any contract negotiated by the Union. That is, any unit employee who received a compulsory assignment to an entity outside of the Guild's jurisdiction would continue to be covered by the collective-bargaining agreement.

I also doubt that this asserted reason was genuine. For one thing the parties had been bargaining over this issue for over a year and no one from the Union ever thought to ask for this information before. Indeed, when later pressed to explain why the Union was seeking this information about nonunit employees, the Union's representative stated, in substance, that it

was being sought to determine what chance the Guild would have in being able to solicit nonunit employees to sign cards authorizing the Union to represent them. That is, the real reason was not for the purpose of bargaining; rather it was for the purpose of organizing.

In any event, when push came to shove, the company ultimately withdrew its multiplatform/flexibility proposals. Therefore, whatever rationale that may have existed for demanding this information in the first place, no longer existed. And it therefore cannot be said that the company's refusal to furnish any of this information could possibly have stood in the way of there being a valid impasse.

3. The Impasse issue

I suppose the fundamental question here is when is enough, enough?

Bargaining in this case commenced on January 23, 2013, and continued until the company declared an impasse on November 20, 2014. Until that point, there was a total of 30 meetings plus many communications over a period of 22 months. And while there were significant time breaks in the bargaining, there is no contention that these were caused by an effort by the company to delay negotiations. If anything, the record indicates that because the company was asking for substantial givebacks, and the Union was unwilling or unable to engage in a strike or other economic activity, it was the Union that was trying to extend bargaining for as long as possible so that it could avoid changes in its most recent collective-bargaining agreement.[13]

[13] In *Atlantic Queens Bus Corp*., 362 NLRB No. 65 (2015), at slip op., p. 14, I made the following observations about the use of time as a bargaining tactic:

> The role of time in negotiations cannot be underestimated and he who can control or manipulate the timing of negotiations can obtain a significant advantage. For example, in first contract negotiations after a union has recently been certified following an election, it may be to the employer's advantage to delay negotiations in the expectation that its employees may be reluctant to strike and that the union will lose its leverage over time. And during that period of delay, the employer will retain its existing wage and benefits costs. In this scenario, so long as an employer does not unduly delay negotiations, the fact that it can legally agree to meet on fewer dates over a longer period of time, provides it with substantial bargaining leverage.
>
> On the other hand, where an employer is seeking cut backs which are, at least to some extent economically necessary, or where a union perceives that an employer is not bluffing and is willing to suffer a strike in order to obtain cutbacks, it would be in the union's interest to stretch out bargaining for as long as possible. In that scenario, because the employer is legally bound to continue the existing wages and terms of employment contained in an expired contract, it is to the union's advantage to retain those wages and benefits by bargaining slowly while avoiding an impasse. Under this kind of scenario, the union's interest would be to meet on fewer occasions and to grudgingly make small concessions in an effort to extend the bargaining process while avoiding an impasse. Just like the first scenario where it is in the interest of an employer to slow down the bargaining process, this second scenario depends on the union meeting the statutory legal obligation to meet at reasonable times and places and to bargain in good faith. But as these terms allow for a good deal of leeway, both unions and employers are, within the limit of "reasonableness," within their legal rights to try to control the tempo of negotiations to their own advantage.

I also note that from the start of bargaining, the company was insistent on a number of contract proposals to change the terms of the expiring contract and it continued these demands until the day that the impasse was declared. These included the company's insistence on inserting a provision in the contract that would allow it to subcontract out unit work of regular employees subject to certain limitations plus a provision that would allow it to unilaterally subcontract out the work of temporary employees. The company, throughout bargaining, insisted on a provision that would eliminate the old contract's provision that required it to first seek and accept volunteers before implementing a layoff. Additionally, the company proposed a clause that would nullify the old contract's provision granting a right of recall in the event that employees were laid off in a reduction in force.[14] After the Union held a ratification vote where the company's last offer was rejected, the parties went back to the bargaining table with the participation of a Federal Mediator. But no progress was made on any of these core issues over the next three bargaining sessions. Instead, the Union mainly gave its reasons for rejecting the company's proposals or called for the production of information.

At the 30th meeting held on November 3, 2014, the Union made a counterproposal regarding subcontracting, but conditioned it on the employer's agreement to retain the voluntary process for layoffs and to keep employee rehire rights. This was rejected by the company's representative who said that these were considered to be core issues from the very start of the negotiations. The company's representative stated that the employer was at its bottom line and asserted that the parties were at an impasse. The Union's representative asserted that the last offer was premature and that there was no impasse. The company's representative then asked if the Union had any new proposals. The Union's response was that "we are not negotiating against ourselves."

I have already determined that the company's proposals regarding subcontracting were mandatory subjects of bargaining and this means that it could insist on its proposals to the point of impasse or as a condition of reaching an agreement. I have further determined that the company did not violate the Act by failing or refusing to furnish to the Union, certain information about nonunit employees. Also, I conclude that there is no evidence to show that the alleged failure to furnish information could reasonably be said to have impeded the parties from reaching an agreement.

Section 8(d) of the Act requires, among other things, that both parties to a collective-bargaining relationship meet at reasonable times and places and bargain in good faith. The definition of good faith is that the parties must negotiate with an intention of reaching an agreement. Nevertheless, the law "does not compel either party to agree to a proposal or require the making of a concession." For this reason, a party is not required "to engage in fruitless marathon discussions at the expense of frank statement and support" of one's position. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

In determining if there is an impasse, the Board has considered a number of factors, including (a) the bargaining history; (b) whether the parties have negotiated in good faith; (c) the length of the negotiations; (d) the importance of the issue(s) over which there is disagreement; and (e) the contemporaneous understanding of the parties regarding the status of the negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[14] As previously noted, the company on September 29, 2014, withdrew its multiplatform/flexibility proposal as well as a number of other proposals that the Union claimed were permissive subjects of bargaining.

In the present case, the parties have had a long history of collective bargaining. As far as I know, there have been no prior findings by this agency demonstrating that the company had any level of hostility towards the Union. Moreover, there is no contention that the Respondent engaged in bargaining with the intent of avoiding an agreement. On the contrary, the record shows that the employer was eager to reach an agreement; albeit one on its own terms. The fact is that there were 30 bargaining sessions over a period of 22 months. Also, at various points during negotiations, the employer acceded to union's requests to extend the existing agreement. And when the company no longer was willing to extend the contract any further, it continued to meet with the Union and to make concessions.

The record shows that with respect to 4 core issues, the employer had insisted on these from the very outset of bargaining and that there was a fundamental disagreement that could not be bridged. These were the employer's insistence on (a) the right, within certain defined limits, to subcontract out work done by full-time and regular part-time employees; (b) the right to subcontract out the work done by temporary employees without limitation; (c) the elimination of the volunteer process for layoffs; [15] and (d) the elimination of the old contract's rehire rights.

The Union notified the company that in its opinion, the tender of a last offer was premature and that the employer's declaration of impasse was not valid. Its representative asserted that there were many issues that remained to be discussed. Nevertheless, after the company's final offer was rejected at a ratification vote, no further progress was made. At the 30th meeting held on November 3, 2014, the Union's representative, when asked if it had anything else to propose, responded that the Union was not going to negotiate against itself.

It is asserted that because the Union expressed its willingness to be flexible, it cannot be said that both parties assumed that further bargaining would be futile. But in my opinion, this cannot be the single criteria to measure if an impasse existed. As noted previously, the Union found itself in a situation where the company was demanding "give-backs" and the Union neither had the will nor ability to engage in an economic strike. It therefore, and quite understandably, invoked a defensive strategy designed to delay bargaining as long as possible so as to preserve the various existing terms and conditions of the last collective-bargaining agreement. If the test is that no impasse can exist if one of the parties expresses an opinion that there is no impasse and that it is ready to make concessions, then theoretically that party can forestall an impasse forever. This would simply be a matter of making tiny incremental changes in its position whenever the other side brought up, or hinted that an impasse was imminent.

In my opinion, the Board's decision in *National Gypsum Co.*, 359 NLRB No. 116 (2013), is controlling. In that case the judge found that the parties reached a lawful impasse caused by their deadlock over the employer's proposal to replace the defined benefit pension with a defined contribution plan and a proposal to permit the employer to unilaterally suspend matching contributions to a 401(k) plan. The Board stated:

> In adopting the judge's finding, we highlight two significant sets of circumstances that support his conclusion. First, the Charging Parties (the Union) attempted to induce the Respondent to withdraw its economic proposals by offering several economic concessions in its March 28 contingent proposal. The Respondent flatly rejected that proposal and gave no

[15] To review, the expired contract required the employer, when layoffs were to occur, to first seek volunteers and to accept 90 percent of those volunteers. The consequence of this provision, as far as the employer was concerned, was that it could not pick and choose those employees that it wanted to let go.

> indication that it would accept any concessions in return for withdrawing its 401(k) and defined contribution proposals. Second, at the September 2 meeting, the Union brought in Jim Robinson, an international union representative and director of its Illinois/Indiana district, to speak against the Respondent's retirement proposals. Robinson spoke at length about the two proposals, stating that the Union would not accept them and that such proposals were "wrong," "shortsighted," "self- destructive," and "an attack on the middle class." When the Respondent's chief negotiator responded that the Union had accepted the same proposals at four other facilities, Robinson said that they should not have been accepted and that the Steelworkers Union was going to do everything it could to "reverse the trend . . . ." Robinson left shortly thereafter, and Union Negotiator Chris Bolte advised the Respondent that Robinson's statements represented the Union's position on the Respondent's proposals.
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> These two events, taken together with the judge's analysis of the Taft factors, show that the Respondent lawfully declared impasse on September 2. The Respondent had steadfastly held to its two proposals and made clear that it was unwilling to accept concessions on other issues in return for dropping them. The Union, in turn, made it clear on September 2 that it would not accept the two proposals and that it was intent on "revers[ing] the trend" toward defined-contribution retirement plans. The Acting General Counsel and the Union contend that the Union's negotiator was Bolte, not Robinson, but Bolte's statement that Robinson spoke for the Union on those issues justified the Respondent's reliance on Robinson's words. Therefore, we adopt the judge's finding that the parties were at impasse on September 2, and we further adopt his dismissal of the refusal-to-bargain and unlawful-impasse allegations.[16]

In light of the above, I find that the parties were at an impasse as of November 20, 2014. Accordingly I find that when the employer implemented its last, best, and final offer on that date, it did not violate the Act. I therefore, conclude that the employer did not violate the Act when it implemented its final offer, by among other things, subsequently subcontracting out work; by eliminating the volunteer process for layoffs; and by eliminating the rehire rights in the expired contract.

4. The New Health Care Program

Because the company was split off from Time Warner, it was required to devise a new health program for all of its employees, of which the union represented about 7 percent. Historically, bargaining unit employees were covered by the same health program that was offered to the unrepresented employees.

For better or worse, the process of devising a new health care program occurred during the same period of time that bargaining was going on with the Union. And it was not completed until well in the 2nd year of the negotiations. During bargaining, the Union proposed its own health plan that was rejected by the employer. At various points during the negotiations, the employer offered a contract proposal to the effect that the union employees would be offered, as part of any new health plan, one option that would provide the same benefits at the same cost to them as they enjoyed under the Time Warner plan. This proposal was also contained in the

[16] See also, WCCO-TV, 362 NLRB No. 101 (2015).

company's final offer and if accepted, would have legally bound the employer to make good on that promise as it would have been enforceable through the grievance/arbitration provisions of the proffered collective-bargaining agreement.

The complaint's allegation is that on January 1, 2015, the Respondent unilaterally and without bargaining to impasse, implemented a new health insurance plan for the bargaining unit employees. In my opinion, this is clearly incorrect. There had been a good deal of bargaining about health care plans prior to the final offer, which admittedly was impeded by the fact that the company's new health program was not finalized until late in the day. Nevertheless, I have concluded that the parties reached an impasse by November 20, 2014, and this means that the employer had the right to implement, in all or part, its final offer. And this included its contract proposal relating to health care. In this respect, once an impasse has been reached, the law does not require that there be an impasse on every single item in the company's last offer before a particular item can implemented.

5. The 401(k) Plan

As I read the General Counsel's Brief, she contends that the Respondent violated the Act by failing to comply with the requirement in the old agreement that the Guild be given notice and an opportunity to be involved in investment option decisions relating to the 401(k) plan. In this regard, she cites the provision in the expired contract that requires advance notice before the company can amend or change a benefit plan. She also cites a provision that calls for the Respondent and the Guild to designate a joint committee to discuss possible recommendations with respect to 401(k) investment options.

As with the health plan, the employees in the unit were covered by the Time Warner 401(k) plan when Time Inc. was part of that company. And in the same manner as the health plan, the Respondent was required to come up with its own 401(k) plan when it was to be split off from the parent corporation. (I would imagine that creating a new 401(k) plan, would be a lot simpler than creating a new set of health care plans).

Towards the end of 2013 Time Inc. notified the Union that matching contributions to the employees' accounts would be reduced from 7 to 5 percent. This notification was made when Time Inc. was still a part of Time Warner. In any event, the Union did not file an unfair labor practice charge as to this change. Also, it did not initiate any contract grievance over this change. In this respect, a reduction of this magnitude in the employer's match would have been quite substantial for those employees who participated in the 401(k) plan.

Before Time Inc. was split off from Time Warner, the employees were notified on April 11, 2014, that there was a change in one of the many fund options offered in the 401(k) program. The change involved the substitution of the Capital Preservation Fund by the Morley Stable Value Fund. Employees were told that any money they had in the former would be transferred to the latter.

At this point, the parties were involved in contract negotiations to replace the contract that would have expired in February 2013 but for the agreement of the parties to extend it.

At the meeting on May 8, 2014, there was a discussion about the proposed changes to the investment options in the 401(k) plan. The company stated that it was going to change its match from 7 to 5 percent. Previously, in December 2013 or January 2014, the Union had been notified that there were going to be changes in the 401(k) plan and that the company intended

to reduce its match from 7 to 5 percent. So this came as no surprise when it was discussed at the May 8, 2014 meeting.

At the May 16, 2014 bargaining session, the parties had a discussion of the 401(k) changes and whether the Union should have a role in choosing investment vehicles.

On June 5, the parties held their 13th meeting, wherein there was a discussion of the 401(k) plan and how it would be impacted by the fact that Time Inc. was about to be spun off from Time Warner on June 6, 2014.

On August 15, the company sent the Union a spread-sheet comparing the contributions made to the 401(k) plan for employees when they were under the Time Warner Plan and what they were under the newly promulgated Time Inc. plan, This stated, inter alia, that contributions were now at a maximum of 5 percent of pay instead of the 7 percent that had been the case under the Time Warner plan.

On August 22, 2014, the company distributed a memorandum to employees to the effect that it was substituting in the 401(k) plan, one Blackrock index fund for another Blackrock index fund. (Fund M for Fund C). Both are foreign large blend funds and each had an expense ratio of .11 percent.

The complaint does not allege and there is no argument that the change in the company's match to the 401(k) plan constituted a violation of the Act. (From 7 percent to 5 percent). This change was announced back in late 2013 when Time Inc. was still a part of Time Warner. Also, this change was announced more than 6 months before the first charge was filed in this case. Therefore, Section 10(b) would bar an allegation that the change in the company's match percentage was a violation of the Act.

Apart from the change in the amount of the employer's match, there were only two changes to investment options. One involved the substitution of the Capital Preservation Fund by the Morley Stable Value Fund as one among many investment options. The other involved changing one Blackrock index fund for another Blackrock index fund. (Fund M for Fund C). Both of those are foreign large blend funds and each had an expense ratio of .11 percent.

In my opinion, these two changes to the investment options available to 401(k) participants were minimal and had little or no impact on unit employees. Thus, whether or not the Union, under the terms of the collective-bargaining agreement, should have been given the opportunity to discuss these changes, the result was of little or no consequence to unit employees. If this was a breach of contract, I deem it to be de minimus.

6. The Direct Dealing Allegation

The complaint alleges that the Respondent, in December 2014 and on various dates in 2015, bypassed the Union and dealt directly with employees by negotiating individual separation agreements.

The record shows that when employees were scheduled for layoffs, they were, in accordance with past practice, offered severance packages that were prepared by the company and given to the affected employee with a copy to the Union. Assuming that there was some give and take between the employee and the company regarding the terms of the severance package, there was nothing to prevent the Union from becoming involved if it wished to do so.

The proviso to Section 9(a) states:

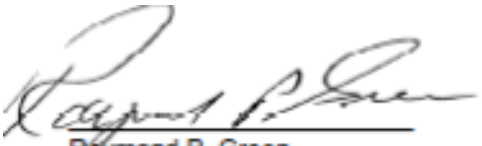
> [A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

To an extent, a negotiation between an employee and the employer regarding the terms of a severance settlement is analogous to the adjustment of a grievance. Inasmuch as the Union was notified of these severance packages and did not choose to get involved in the process, I don't think that these transactions rose to the level of direct dealing. I therefore shall recommend that this allegation be dismissed.

Conclusion

Based on all of the above, it is my opinion that the Respondent has not violated the Act in any manner encompassed by the complaint. Therefore I recommend that the complaint be dismissed.

Dated: Washington, D.C., August 9, 2016



Raymond P. Green
Administrative Law Judge